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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, APPELLANT,
v.
SOUTHERN PACIFIC COMPANY, CENTRAL PACIFIC RAILWAY COMPANY, UNION TRUST COMPANY OF NEW YORK, et al. } No. 21.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

BRIEF FOR APPELLANT.

This is an appeal from a decree dismissing a petition to dissolve a combination as unlawful under the Sherman Antitrust Act and for relief under the Pacific Railroad laws.

PLEADINGS.

This is a petition filed on February 11, 1914, by the United States against the Southern Pacific Company, the Central Pacific Railway Company, the Union Trust Company of New York, and the officers and directors of the Southern Pacific Company for relief under the Sherman Antitrust Act of July 2, 1890, and under the Pacific Railroad laws, against

the continuance of a monopoly and of a combination in restraint of trade, formed by the Southern Pacific Company by acquiring all the capital stock in the Central Pacific Railroad Company and in its successor, the Central Pacific Railway Company, pursuant to a plan promulgated February 20, 1899, at which time the Southern Pacific Company already held all the stock of the Southern Pacific Railroad Company.

The defenses presented by the answer may be summarized as follows:

1. The two lines made by the Central Pacific Railroad and its connections and the Southern Pacific Railroad and its connections are not and have not been natural competitors (28).

2. Competition between the two lines has not been restrained (29).

3. The defendants have not monopolized or attempted to monopolize commerce (30).

4. The defendants have not violated the Pacific Railroad laws by failing to operate the Central Pacific Railroad with the Union Pacific Railroad as one connected, continuous line, or by discriminating against the Union Pacific Railroad (31).

5. The two lines composed of the Southern Pacific Railroad and its connections and the Central Pacific Railroad and its connections were built, extended, controlled, and operated as one property (36).

6. The United States is estopped from maintaining this petition by its conduct in connection with

the settlement of the debt of the Central Pacific Railroad Company (36).

7. The decree in the case of the United States against the Union Pacific Railroad Company is res adjudicata against the present petition (45).

8. The United States is barred by its laches (46).

9. The United States is barred under the statute of limitations by the lapse of more than five years since the accrual of the causes complained of (46).

[References, unless otherwise indicated, are to pages of the printed record.]

DECISION OF THE DISTRICT COURT.

This case was heard in the first instance in the district court by Judges Sanborn, Hook, and Carland, on evidence and exhibits taken wholly before an examiner and submitted in print to the court. A decree was entered dismissing the petition pursuant to the opinion of Judge Hook, Judge Sanborn concurring and Judge Carland dissenting.

To quote from the dissenting opinion, "it is difficult to determine from the opinion of the majority exactly upon what ground or grounds the bill in this case is dismissed" (2336).

The opinion of the majority describes the physical relation of the two railroads (2328), the acquisition of control over the Southern by the promoters of the Central (2329), the control by these promoters over the construction of the two railroads, the operation of the Southern by the Central as lessee; the leasing of the two to the Southern Pacific Com-

pany (2330), the consequent absence of competition (2330), the acceptance of the securities of the Southern Pacific Company in 1899 by the commission on the collection of the Pacific Railroad debt (2332), and leaves it open to conjecture on what ground the dismissal is based.

The majority opinion gives no effect to the difference of ownership of the two railroads at all times prior to 1899, or to the invalidity of the leases under the Acts of Congress (and holds immaterial their invalidity under the State laws), or to the obligations to compete under the terms of the leases. It fails to consider the principle that the existence of relations restraining competition between two railroads before 1890 would not validate a new combination made in 1899.

The minority opinion, on the other hand, says:

> It seems to be conceded that but for the common control there would be competition.
>
> There is natural competition which is suppressed by reason of the control of the Central Pacific by the Southern Pacific.
>
> The fact that prior to the passage of the antitrust law there had been a practical control of the Central Pacific by the Southern Pacific through a leasing arrangement in no way validates the present combination, if it be unlawful.
>
> The evidence in the record in my opinion establishes beyond question that the Southern Pacific extending from San Francisco Bay to New Orleans, with its steamship connection

to New York, is a natural competitor of the Central Pacific, both as to California-Atlantic Seaboard freight, and central and western United States freight, to and from California.

It follows that the free flow of interstate commerce is restrained.

I do not think the evidence shows that the Central Pacific and the Southern Pacific were created originally and have always continued to be one system. They have always been and are now operated as separate systems.

The settlement by the United States of the debt of the Central Pacific in 1899 can not be held to estop the United States from insisting at this time that the combination between the two roads is in violation of the antitrust act.

Finally, I am unable to reconcile the decision of the Supreme Court in the case of *U. S.* v. *Union Pacific Railroad Company*, 226 U. S. 61, with the conclusion reached by the majority in this case. The Union Pacific and the Central Pacific constitute one transcontinental line from Omaha, Nebr., to the Pacific coast.

If it is unlawful for the Union Pacific, being one section of the through line to control the Southern Pacific, why is it not unlawful for the Southern Pacific to control the other section of the through line?

ASSIGNMENT OF ERRORS.

The United States of America, the petitioner, assigns as the errors in the proceedings and final decree entered March 9, 1917, in the above-entitled cause, on which errors it will rely in the prosecution of its

appeal from said decree, that a decree should not have been entered dismissing the petition, but that, on the contrary, a decree should have been entered granting relief to the petitioner to dissolve the combination and monopoly complained of, and to prevent the further infraction of the Pacific Railroad laws, and for greater particularity the petitioner assigns that said errors were committed in failing in said proceedings and decree to give sufficient consideration and effect to the matters of law and matters of fact apparent in the record as follows, namely:

First. In February, 1899, when this combination was formed, the Central Pacific Railroad and the Southern Pacific Railroad were existing railroads naturally competitive for an enormous volume of interstate traffic, and the combination between them unreasonably, directly, substantially, and wholly prevented and destroyed competition between them, and continues to do so, and the combination artificially created a monopoly to the public injury (*infra*, p. 18).

Second. The Pacific Railroad laws imposed on the franchise of the Central Pacific Railroad and on the franchise of the Union Pacific Railroad, the reciprocal duty of the one railroad not to discriminate against the other in favor of any other railroad, but to exert together in normal voluntary cooperation all the natural forces of a single railroad naturally competing with the parallel Southern Pacific Railroad, and the systematic and preconcerted discrimination which the Southern Pacific Company in operating the franchise of the Central Pacific Railroad has practiced against

the Union Pacific Railroad in favor of the Southern Pacific Railroad is a violation of those laws; and this combination between the Southern Pacific Railroad and the Central Pacific Railroad furnishing the incentive of self-interest to discriminate against the Central Pacific Railroad and the Union Pacific Railroad in favor of the Southern Pacific Railroad, and so to violate those laws, imposed on the Central Pacific Railroad an unreasonable and unlawful restraint to the injury of the public and to the defeat of the purpose of those laws, which was to create and develop three separate competitive systems of railroad to the Pacific coast, with all the advantages that would come to the public from three railroads which were competitive (*infra*, p. 119).

Third. The payment by the Central Pacific Railroad Company of its debt to the United States and the transactions leading thereto did not exempt the Southern Pacific Company from the provisions of the Sherman Antitrust Act of July 2, 1890, or permit that company to make a combination which otherwise would be one in restraint of trade, because (1) the settlement commission did not seek any guaranty by the Southern Pacific Company, (2) the contract of settlement did not require such a guaranty, (3) the United States received only payment of a debt already due and adequately secured, (4) neither the commission, nor the President, nor the Congress purported to give this company a special indulgence to make a combination in restraint of trade, prohibited as a crime by general law to all

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other corporations, and (5) such a special indulgence or advance pardon is beyond the constitutional power of the commission, the President, and the Congress (*infra*, p. 162).

Fourth. The Central Pacific Railroad and the Southern Pacific Railroad were never, prior to February 20, 1899, a single railroad or system, but, on the contrary, were always two distinct railroads, (1) separately projected by separate and unrelated groups of men, (2) separately aided by gifts of public lands and loans of the public credit under acts of Congress to promote these two separate, competitive systems of railroad between the Atlantic Ocean and the central United States on the east and the Pacific Ocean on the west, and enacted prior to 1867, and before any person interested in the one railroad was interested in the other, (3) separately owned by separate corporations organized by separate groups of men, (4) separately constructed at the expense of and for these separate corporations, (5) separately leased by these separate corporations under separate leases, making the amount of rent dependent on the net earnings of the separate railroads, (6) separately controlled by boards of directors, some of whom were always diverse, and a majority of whom were diverse in all but five years between 1865 and 1899, and (7) separately stock owned, always to a substantial extent, and from 1883 to 1899 to the extent of more than a majority of the capital stock in each separate corporation, held by widely scattered stockholders in the United States and in Europe (*infra*, p. 196).

Fifth. The Southern Pacific Company on February 20, 1899, had no contractual, or property, or vested interest, direct or indirect, in the Central Pacific Railroad, because (1) the purported lease of February 17, 1885, by the Central Pacific Railroad Company was void for lack of power in that company to make it, both under the laws of California and under the laws of the United States, the sovereignty from which it derived its franchises, (2) in 1893 this lease was canceled and the new purported lease then given was equally void for the same reason, and (3) the leasehold interest was subject to immediate destruction by the foreclosure of the underlying lien of the United States (*infra*, p. 234).

Sixth. Even if the Southern Pacific Company had had some control over the Central Pacific Railroad before the Sherman Antitrust Act was passed, this would not render lawful a combination for the increase and perpetuation of that control, formed after this act was passed (*infra*, p. 253).

INTRODUCTORY OUTLINE.

The combination which the Government seeks to dissolve was made pursuant to a plan promulgated February 20, 1899.

In 1852 the project to build railroads to connect the Atlantic and Pacific Oceans across the United States resulted in an act of the legislature of California to grant a right of way to the United States through the State for this purpose.

In 1861 the Central Pacific Railroad Company of California was incorporated to construct a railroad from Sacramento to the eastern boundary of California.

In 1862 and 1864 Congress passed the Pacific Railroad laws, which incorporated the Union Pacific Railroad Company to build a railroad from the Missouri River westward, and authorized the Central Pacific Railroad Company to build eastward to a meeting point. These acts (1) empowered these two companies to issue first mortgage bonds at the rate of $16,000, $32,000, and $48,000 per mile, dependent upon the character of the country and (2) granted to them an equal amount of bonds of the United States for the payment of which, the United States was secured by a lien second only to the first mortgage bonds, and (3) granted them 20 square miles of public lands for each linear mile of railroad constructed.

These acts directed in return (1) that these two railroads should, as far as the Government and the public were concerned, be operated as one continuous line, and (2) that neither should discriminate in favor of either, or against either.

The promoters of the Central Pacific Railroad were Leland Stanford, Collis P. Huntington, Mark Hopkins, and Charles Crocker. They acquired a large part of the capital stock of this company. There was always a substantial amount of this stock owned by others.

Between 1864 and 1869, this railroad, and the Western Pacific Railroad (which was afterwards consolidated with it), was constructed from San Francisco Bay to a junction with the Union Pacific Railroad at Ogden, Utah, thus completing a line of railroad from the Atlantic Ocean to the Pacific Ocean, running for some distance near the forty-first parallel of latitude.

In 1865, pursuant to a project for through routes via the thirty-second and thirty-fifth parallels of latitude, the Southern Pacific Railroad Company was organized by an entirely different group of men for the purpose of constructing a railroad from San Francisco Bay via San Diego to the eastern boundary of California, to connect with a contemplated railroad from that point to the Mississippi River.

In 1866, Congress passed an Act to incorporate the Atlantic & Pacific Railroad Company to construct a railroad near the thirty-fifth parallel of latitude from Springfield, Mo., to the Pacific Ocean. This Act authorized the Southern Pacific Railroad to connect with the Atlantic & Pacific Railroad near the eastern boundary of California, and gave to both of these companies a subsidy of public lands.

In 1867, the Southern Pacific Railroad Company changed its route to turn eastward without going as far south as San Diego. In 1870, Congress and the California Legislature ratified this change.

In 1871, Congress passed an Act to incorporate the Texas Pacific Railroad Company to construct a rail-

road near the thirty-second parallel of latitude from Marshall, Tex., via El Paso, Tex., to the Pacific Ocean at San Diego, and to connect on the east with existing railroads, and on the west with the Southern Pacific Railroad. This Act authorized the Southern Pacific Railroad Company to construct a railroad from Tehachapi Pass to a junction with the Texas Pacific Railroad at the eastern boundary of California. This act also gave both companies a subsidy of public lands. It authorized the Texas Pacific Railroad to consolidate with other railroads, provided that they were not competing lines. These several railroads accepted these several acts and undertook the duties imposed by them.

So were launched, with Government aid, three projects for competing lines of railroad to the Pacific Ocean, one of them dependent on the Central, and two of them dependent on the Southern to reach the more settled part of California.

The promoters of the Central perceived the impending competition from the Southern, and in 1870 acquired a controlling amount of the stock of the Southern Pacific Railroad Company. Before 1885 they had acquired all its stock.

By 1872, the Central had extended a southerly branch, from its main line, to Goshen in the San Joaquin Valley.

When the promoters of the Central acquired control of the Southern in 1870, its line extended southerly from San Francisco to Gilroy. It was projected from

this point to a point in the San Joaquin Valley near Goshen, and thence southerly to the two connections, one with the Atlantic & Pacific Railroad and the other, with the expected Texas & Pacific Railroad.

The section to connect Gilroy with Goshen was never completed. Instead, the construction was taken up in 1872 at Goshen at the end of the branch of the Central and without interruption the line was completed southerly through Tehachapi Pass, and thence one fork to a junction with the Atlantic & Pacific Railroad at The Needles on the Colorado River at the eastern boundary of the State, and the other fork to the southeasterly corner of the State opposite Yuma, Ariz., thence across Arizona and New Mexico to a junction with the Texas & Pacific Railroad at Sierra Blanca, Tex. and to a connection at El Paso, Tex., with the Galveston, Harrisburg & San Antonio Railroad, thus eventually completing a through line to New Orleans.

As the sections of this southern line were built they were leased temporarily to the Central.

It is not unlikely that the first mortgage bonds and the Government loaned bonds yielded enough money to construct the Central.

Under the terms of the acts of 1862 and 1864, the Central was not obliged to pay currently the interest on the Government bonds. It paid substantial dividends, and its stock acquired a good market value.

On the strength of the dividend showing, the promoters of the Central sold the greater part of its

stock. These sales began as early as 1877. By 1883, a majority of the stock had been sold, and was held by strangers, and to a large amount in Europe.

The stock certificates were issued, largely in the names of office employees. They had attached to them dividend warrants payable to bearer, similar to coupons on a bond. This, coupled with the fact that there was a stockholder's liability for debts of the corporation, deterred the recording of transfers of shares. This left the apparent stock-voting power in the promoters and these office employees.

Although the competition between the two lines was imminent, it did not become possible to any extent until 1881.

In 1881, the Southern Pacific Railroad made a junction with the Atchison, Topeka & Santa Fe Railroad at Deming, N. Mex. Then, for the first time, competition between the Southern and the Central in the transportation of transcontinental freight became possible. In 1882, the Southern made a junction with the Texas & Pacific Railroad at Sierra Blanca, Tex., thus making another through route. In 1883, the direct line of the Southern in connection with the Galveston, Harrisburg & San Antonio Railroad and its eastern connections was completed through to New Orleans.

In 1883, the Southern made its junction with the Atlantic & Pacific Railroad at The Needles, and so completed another railroad (now the Atchison, Topeka & Santa Fe) to the east.

All these southern lines were dependent upon the Southern Pacific to reach California.

The Union Pacific was dependent on the Central Pacific to reach California.

On these several dates, when competition first became possible, the Central was owned by the Central Pacific Railroad Company, and the stock in it was in widely scattered ownerships, and the Southern was owned by the Southern Pacific Railroad Company and connecting lines, the stock of which was owned wholly or nearly so by Stanford, Huntington, Crocker, and the Hopkins estate.

This separation in ownership continued until the combination in 1899.

In 1884, the Southern Pacific Company was organized in Kentucky.

In the early part of 1885, this company acquired all the stock of the Southern Pacific Railroad Company and its connecting lines to New Orleans with steamship connections to New York, but it acquired no stock in the Central Pacific Railroad Company.

In 1885, these southern railroads purported to make a lease to the Southern Pacific Company, and the Central Pacific Railroad Company purported to make a separate lease to the Southern Pacific Company. These leases, and particularly that by the Central Pacific Railroad Company, for reasons hereinafter stated (p. 237), were void.

The terms of the lease of the Central, made the rental dependent in part upon the earnings of that

railroad, so that the Southern Pacific Company was under obligation to compete for as much business as possible for the Central Pacific Railroad against the Southern Pacific Railroad.

In 1893, this lease was canceled, and a new lease (also void) was given to the Southern Pacific Company.

In 1898, the obligation of the Central Pacific Railroad Company to retire the bonds given it by the Government had matured. In July, Congress passed an act for the creation of a commission composed of the Attorney General, the Secretary of the Treasury, and the Secretary of the Interior, to negotiate a settlement of this debt. This Act directed the President to foreclose the lien upon the railroad if settlement was not made within a year.

The Central Pacific Railroad Company then had outstanding (1) first-mortgage bonds amounting to about $59,000,000; (2) Government bonds, on which the Government was protected by the second lien, about $58,000,000; and (3) common stock, about $67,000,000. Its average earnings for 10 years had been sufficient to enable the company to pay 4½ per cent annually on the $117,000,000, bonded debt but no dividends on stock.

If the Government lien was foreclosed, it would destroy the lease whether valid or void, and the Central Pacific Railroad, then already in a separate corporate and essential ownership from the Southern Pacific Railroad, would pass into the operating con-

trol of persons not associated with its competitor. To avoid this, a plan was devised for refunding first mortgages sufficient in amount to take care of the existing first mortgage and the Government lien and some additional amounts, and for the transfer of the stock of the Central Pacific Railroad Company to the Southern Pacific Company in return for stock and bonds of the Southern Pacific Company.

The plan was carried out, and the Southern Pacific Company, which never before had owned any part of the securities or stock of the Central Pacific Railroad Company, acquired virtually all the stock in that company and its immediate successor, the Central Pacific Railway Company, and it retained all the stock in the Southern Pacific Railroad Company and the connecting lines to New Orleans and New York.

This transaction, if valid, suppressed all competition and all possibility of competition between the two railroads.

The freight as to which the two lines are competitive is enormous in amount and value.

The control of the Southern Pacific Company owning a through line over the Central Pacific Railroad furnishes the incentive of personal gain to divert as much of the freight of the Central Pacific Railroad as possible from the Union Pacific Railroad to the Southern Pacific Railroad; and, responsive to this incentive, the Central Pacific Railroad, under the control of the Southern Pacific Company, has dis-

criminated continuously against the Union Pacific Railroad in favor of the Southern Pacific Railroad, contrary to the duties imposed by the Pacific Railroad Acts.

The combination of the two railroads under one control not only restrained trade, but monopolized the interstate railroad transportation with all parts of California north of Tehachapi Pass, notwithstanding that at the time there were in existence these two railroads, separately owned and competitors for the business.

FIRST ASSIGNMENT.

In February, 1899, when this combination was formed, the Central Pacific Railroad and the Southern Pacific Railroad were existing railroads naturally competitive for an enormous volume of interstate traffic, and the combination between them unreasonably, directly, substantially, and wholly prevented and destroyed competition between them, and continues to do so, and the combination artificially created a monopoly to the public injury.

(1) The Central Pacific Railroad and the Southern Pacific Railroad are competitive and have been so continuously since 1883. (2) The area as to which they are competitive is large, and the volume of competitive freight is enormous. (3) The combination in February, 1899, unreasonably restrained this competition. (4) This combination produced also a monopoly.

FIRST.

THE CENTRAL PACIFIC RAILROAD AND THE SOUTHERN PACIFIC RAILROAD ARE COMPETITIVE AND HAVE BEEN SO CONTINUOUSLY SINCE 1883.

An inspection of a railroad map of the United States is enough to show the competitive character of these two railroads with respect to the transportation of interstate freight between California, and to some extent Oregon and Nevada on the west, and all parts of the eastern half of the United States on the east.

The *Central Pacific Railroad* extends from San Francisco Bay to Ogden, Utah, with a branch extending north from Roseville in central California to the northern boundary of California, and to Kirk in Oregon, and a branch extending south from Lathrop in central California to Goshen, Calif., and a branch extending south from Hazen in Nevada to Mojave in California, and a branch extending northwest from Fernley in Nevada to Susanville in California, and a short line from Oak Ridge in Oregon to Natron in Oregon. At Ogden, the Central Pacific Railroad connects with the Union Pacific Railroad which extends to Omaha, Nebr., and Kansas City, Mo. The Central Pacific Railroad also connects at Ogden with the Denver & Rio Grande Railroad, which, with its allied connection, the Missouri Pacific Railroad, extends to the Missouri River. From the Missouri River connecting railroads extend

to all important points in the central and eastern parts of the United States.

The *Southern Pacific Railroad*, in connection with other railroads controlled by the Southern Pacific Company, extends from San Francisco Bay through El Paso, Tex., to Galveston, Tex., and to New Orleans, and connects at these last two cities with steamship lines operated by the Southern Pacific Company to New York City. At El Paso, it connects with the Rock Island, so called, which runs to Omaha and to Chicago. At New Orleans, the Southern Pacific Railroad connects with a number of railroads extending to all important points in the eastern part of the United States. It owns and operates a number of branches in Texas, New Mexico, Arizona, and Oregon, and many in California.

The Central Pacific Railroad and the Southern Pacific Railroad, with their connections, form separate complete routes from many of the important California terminals to all the important terminals east of the Missouri River, and of the Mississippi River (Maps, P. Ex. 1, p. 1223; P. Ex. 74, p. 1671; D. Ex. 55, p. 2242).

Two railroads transporting freight to a substantial extent by different routes between two common points are naturally competitive.

United States v. *Pacific & Arctic Co.*, 228 U. S. 87.

United States v. *Reading Co.*, 226 U. S. 324.

United States v. *Union Pacific R. R. Co.*, 226 U. S. 61.

Northern Securities Co. v. *United States*, 193 U. S. 197.

United States v. *Joint Traffic Association*, 171 U. S. 505.

United States v. *Trans-Missouri Freight Association*, 166 U. S. 290.

Louisville & Nashville R. R. Co. v. *Kentucky*, 161 U. S. 677, 691, dictum.

United States v. *Union Pacific Railroad Company*, 226 U. S. 61, determined, as the fundamental point of the decision, the competitive character of these two railroads. In that case, the competitive railroads considered were the Southern Pacific on the one hand, and the Union Pacific on the other. For these competitive operations, the Union Pacific Railroad used the Central Pacific Railroad from Ogden to California, and used independent connections eastward. If the Union Pacific is competitive with the Southern Pacific, it follows inevitably that the Central Pacific is competitive with the Southern Pacific.

The witnesses for the defendant concur with those for the petitioner and admit the *actual* and *practical* competitive character (and not merely theoretic) of these two railroads. It is not in dispute. (Spence, 1018, 1079, 1080, 1084, 1097, 1164, 1166, 1171; Kruttschnitt, 774, 816, 807, 739, 805, 772, 737; Rail-

way Guide, p. 39; P. Ex. 28, p. 1523; Stubbs, 97; P. Ex. 22, p. 1476; Stanford, 98; Lincoln, 109, 113, 122, 123, 297; Schumacher, 149, 150, 156, 164; Munroe, 371, 372; Lovett, 294, 297; Chambers, 965, 950, 968; Connor, 336; Sproule, 224, 180, 182, 199, 241, 245.)

In *United States* v. *Union Pacific Railroad Co.*, 188 Fed. 102, 124, Judge Hook, whose conclusion was approved by the Supreme Court, said (if "Central" be substituted for "Union") that—

> In a broad and substantial sense, in the sense in which the terms are used in consitutions and statutes and in railroad and business circles, the (Central) Pacific and Southern Pacific lines were parallel and competing. That they were so regarded by practical men having to do with transportation in its various phases is shown, I think, by an overwhelming mass of evidence. But, had no witness testified regarding it, we should come to the same conclusion.

The test of competitiveness is not extension for the total distance between common points. It is the actual capacity in practical operation to transport between such points, either by lines independently controlled, or with the assistance of lines controlled by others, but available in practice for the completion of the transportation.

U. S. v. *Union Pacific Railroad Co.*, 226 U. S. 61.

There is nothing that can be said in favor of the competitiveness of the Union Pacific Railroad against the Southern Pacific Railroad which can not be said for the Central Pacific Railroad. On the other hand, the Central Pacific Railroad is more effectively competitive. It is the initial or terminal line in the through route and that gives it more control than is possessed by an intermediate line. (Connor, 345; Schumacher, 154.) The firmness of this control is discussed later.

SECOND.

THE AREA AS TO WHICH THEY ARE COMPETITIVE IS LARGE, AND THE VOLUME OF COMPETITIVE FREIGHT IS ENORMOUS.

(1) The *area* as to which these two railroads are competitive is not much in dispute. The defendants admit that these two railroads are competitive between northern and central California on the west and Atlantic Seaboard Territory and the Middle West Territory on the east. The evidence establishes that the western area includes also Nevada, southwestern Oregon, and the southern part of California, as far south or east as Banning (Spence, 1079, 1083, 1089, 1092, 1096). Apparently, the only dispute as to this southern part of California is as to whether the division line should be drawn at Banning, or at Mojave and Santa Barbara. Mojave is on the valley line of the Southern Pacific

just south of the pass through the Tehachapi Mountains, and Santa Barbara is on the coast line of the Southern Pacific in the same approximate latitude. Banning is farther south and east.

Atlantic Seaboard Territory includes everything east of a line drawn from Toronto, Ontario, through Buffalo, Pittsburgh, Wheeling, and Bristol, Tenn., north of the line of the Norfolk & Western Railway to the Atlantic Ocean. (P. Ex. 64, p. 1666; Lincoln 109; Schumacher, 143; Spence, 1035.)

Middle West Territory includes everything west of Atlantic Seaboard Territory and north of the Ohio River and the northern boundaries of Arkansas and Oklahoma, and east of the line of the Chicago, Rock Island & Pacific Railroad from its intersection with this northern boundary, and thence via McFarland and Belleville, Kans., and Des Moines, Iowa, to St. Paul, Minn. (Spence, 1079.)

Central Freight Association Territory is the portion of the Middle West Territory east of the Mississippi River. (P. Ex. 64, p. 1666; Schumacher, 144; Munroe, 375; Sproul, 198.)

From *south of Mojave* to east of the Missouri River there is a substantial movement of citrus fruits over the Central Pacific Railroad. (Spence, 1128.)

Southwestern Oregon also is in the competitive area. Probably this is not disputed. Mr. Kruttschnitt, the chairman of the executive committee of the Southern Pacific Company, testified that the

competitive area extends as far north as Oregon. (Kruttschnitt 816.) The statistics of tonnage hereafter referred to show substantial movements from and to this territory over the Southern route, and all of this crosses the Central route.

Nevada also is in the competitive area. The Central route is the natural direct route for this territory, but a volume of freight, large in comparison with the entire freight of this State, has been transported from Nevada over the Southern route.

(2) The *volume* of freight moved over these two railroads between the territories as to which they are competitive is enormous.

Common knowledge establishes this sufficiently, but this is convincingly reinforced by the evidence.

Between these territories, in the year ending June 30, 1914, the Southern Pacific moved either through El Paso or through Ogden 1,473,135 tons, for which the revenue for this company alone was $13,799,059. (Spence 1101.)

The tables prepared by the Southern Pacific Company (P. Ex. 43–58, pp. 1648–1654; D. Ex. 62–83, pp. 2247–2256), which show certain freight movements for the year ending June 30, 1914, reduced to a single table, are as follows:

Origin.	Destination.	Gateway.	Tons.	Dollars.
Nevada, Oregon, California north of Banning.	Atlantic seaboard	Ogden	154,229	926,433
Do.	do	El Paso	85,059	1,202,109
Do.	Middle West	Ogden	368,975	2,576,384
Do.	do	El Paso	222,325	1,838,626
Atlantic seaboard	Nevada, Oregon, California north of Banning.	Ogden	68,916	593,339
Do.	do	El Paso	94,737	1,899,083
Middle West	do	Ogden	259,648	2,451,700
Do.	do	El Paso	219,246	2,311,283
Central Pacific rails	Atlantic seaboard	do	34,812	646,005
Do.	Middle West	do	31,180	269,457
Nevada	Atlantic seaboard	do	0	0
Do.	Middle West	do	0	0
Oregon & Northern California	Atlantic seaboard	do	22,161	426,334
Do.	Middle West	do	5,351	51,384
San Francisco & Oakland	Atlantic seaboard	do	4,598	95,841
Do.	Middle West	do	10,295	76,209
Atlantic seaboard	Central Pacific rails	do	50,045	1,093,267
Middle West	do	do	63,734	663,035
Atlantic seaboard	Nevada	do	539	13,281
Middle West	do	do	30	909
Atlantic seaboard	Oregon & Northern California	do	2,801	84,200
Middle West	do	do	13,122	124,919
Atlantic seaboard	San Francisco & Oakland	do	38,933	920,302
Middle West	do	do	40,497	433,465
Central Pacific rails	Atlantic seaboard	Ogden	154,229	926,433
Do.	Middle West	do	368,975	2,576,384
Nevada	Atlantic seaboard	do	28,234	456,501
Do.	Middle West	do	16,852	140,671
Oregon & Northern California	Atlantic seaboard	do	27,517	167,059
Do.	Middle West	do	86,165	471,253
San Francisco & Oakland	Atlantic seaboard	do	14,025	127,697
Do.	Middle West	do	52,432	336,753
Atlantic seaboard	Central Pacific rails	do	68,916	593,339
Middle West	do	do	259,648	2,451,700
Atlantic seaboard	Nevada	do	2,138	30,198
Middle West	do	do	25,898	286,737
Atlantic seaboard	Oregon & Northern California	do	4,684	40,231
Middle West	do	do	17,362	146,726
Atlantic seaboard	San Francisco & Oakland	do	44,214	380,258
Middle West	do	do	126,237	1,140,547
South of Mojave	Atlantic seaboard	do	[1] 13,329	
Do.	Middle West	do	[2] 37,757	
North of Mojave	Atlantic seaboard	El Paso	[3] 58,644	
Do.	Middle West	do	[4] 80,000	
Atlantic seaboard	North of Mojave	do	[4] 60,225	
Middle West	do	do	[5] 95,000	

[1] Approximately (p. 1095).
[2] Approximately (p. 1096).
[3] Approximately (p. 1098).
[4] Approximately (p. 1099).
[5] Approximately (p. 1100).

On this table the figures against "Central Pacific rails," origin or destination, include freight which originated, passed over, or was delivered on the Central Pacific Railroad, or originated or was delivered at points reached by the Central Pacific Railroad (Spence, 1052); "Oregon & Northern California" means Oregon and that portion of California north of Roseville, Davis, Elmira, Suisun, and South Vallejo; "San Francisco & Oakland" means those cities and other places whose transcontinental freight moved through San Francisco or Oakland.

The tonnage moved by the Southern Pacific Company through Ogden divided between the competitive and noncompetitive territories as follows:

	Tons.	Per cent.
Eastbound to Atlantic seaboard	154,229	20.6
Eastbound to Middle West	368,975	49.5
Eastbound to elsewhere	223,613	29.9
Total	746,807	100.0
Westbound from Atlantic seaboard	68,916	11.2
Westbound from Middle West	259,648	42.0
Westbound from elsewhere	289,361	46.8
Total	617,925	100.0

Of this eastbound Ogden tonnage, 70 per cent moved to territories as to which Ogden and El Paso are competitive gateways (Spence, 1082). Of that west bound, 53 per cent moved from such territories (Spence, 1083). The combined east and west percentage is 62.4 per cent of the total tonnage through Ogden.

The figures have not been compiled from which to make a similar comparison as to the tonnage moved through El Paso. (Spence 1083.)

The freight included in the sixteen items for movements through El Paso from or to Central Pacific rails, Nevada, Oregon, and Northern California and San Francisco and Oakland, cover freight which was moved over the Southern Pacific Railroad, notwithstanding the fact that it originated or was delivered in the territory of the Central Pacific Railroad.

Of the eastbound freight from competitive territory to Atlantic seaboard, moved through El Paso, 40 per cent originated in the territory of the Central Pacific Railroad. Of the westbound freight from Atlantic seaboard territory to competitive territory, moved via El Paso, about 52 per cent was delivered in Central Pacific Railroad territory. Of that so moved from the Middle West about 29 per cent was so delivered.

These last comparisons do not include that large volume of freight which, although not originating on the Central Pacific rails or delivered thereon, would nevertheless have had a much shorter haul if moved through Ogden.

Of the freight moved from Atlantic seaboard territory to competitive territory, via El Paso, over 41 per cent moved to or through San Francisco or Oakland. Of that so moved from Middle West territory, 18 per cent so moved. Of that so moved

from the Middle West territory, 6 per cent was delivered to points north of the main line of the Central Pacific Railroad from Ogden to Sacramento.

The figures given for the El Paso gateway do not include the freight moved between California and the southern, south central, and southeast part of the United States, or the freight moved between points south and east of Banning, Calif., on the west, and all other points on the east. They include substantially only that freight for the movement of which the Central Pacific Railroad is naturally in a position to compete.

The Central Pacific Railroad is in a better position than the Southern Pacific Railroad to compete for all classes of Atlantic seaboard and Middle West freight moved to or from points north of Mojave, Calif., and the Central Pacific Railroad is in as good a position as the Southern Pacific Railroad to compete for substantially all Atlantic seaboard and Middle West freight moved to or from points north of Banning, Calif. (Spence 1105.)

There is no class of this freight which moves through El Paso which could not be moved through Ogden.

The Sunset Gulf Route because of its water haul between Galveston or New Orleans and New York is said to be unsuited to handling certain classes of freight which move through Ogden. This objection does not apply to the movement of freight over

the Southern Pacific Railroad between California through El Paso, or other Texas junctions, or New Orleans, and over connecting railroads from these points. (Spence 1105.) A large amount of such freight now moves over the Southern Pacific Railroad and the Rock Island Railroad through El Paso, and a large amount of such freight moves over the Santa Fe Railroad.

The figures in evidence do not show the volume of the classes of freight that will not stand the split water and rail haul. (Eshleman 953.) It appears that there is a substantial amount of fresh fruit moving through Ogden and El Paso which does not move by the Sunset Gulf boats. Mr. Schumacher testified (159) that there are very few commodities that will not move part water and part rail.

Owing to the destruction of the records of the Southern Pacific Company the evidence is not as complete for earlier years as it is for the year ending June 30, 1914, but some information appears from outside sources.

From 1906 to 1914, the annual eastbound tonnage delivered by the Central Pacific Railroad to the Union Pacific Railroad at Ogden ranged from 472,615 tons to 623,162 tons. During the same period the annual westbound tonnage received by the Central Pacific Railroad from the Union Pacific Railroad at Ogden ranged from 501,848 tons to 672,852 tons. During this period the combined

east and west bound tonnage so delivered at Ogden ranged from 1,094,716 tons to 1,263,962 tons. (P. Ex. 73, p. 1671.) During this period the annual revenue of the Union Pacific Railroad alone derived from the movement of this freight ranged from $7,400,264.89 to $8,527,389.57. Since 1870 the joint rate between the Missouri River and California terminals has been divided in the ratio of 46 per cent to the Central Pacific Railroad and 54 per cent to the Union Pacific Railroad. (Schumacher, 155; Munroe, 370; P. Ex. 33, p. 1622.)

Mr. Connor, who since 1887 has been in charge of that part of the Middle West territory which lies southeast of an imaginary line drawn from St. Louis through Danville, Ill., Terre Haute, Ind., to Detroit, Mich., and a part of the territory just south of the Ohio River, testified concerning the movement from this territory through New Orleans and through Ogden.

Between 1901 and 1908 the number of westbound carloads moved annually from this territory through New Orleans or Ogden to California by the Southern Pacific Company ranged from 2,374 to 5,073. (P. Ex. 68, p. 1669; Connor, 355, 333.) In 1912, 4,647 carloads were so moved, and about one half were moved by the Central Pacific Railroad and the other half by the Southern Pacific Railroad. (P. Ex. 69, p. 1669.)

From 1890 to 1899 the freight moved west from this territory to California via New Orleans by the

Southern Pacific Company alone, amounted annually to an average of 972 carloads. In the largest year, 1898, the number was 1,942. (P. Ex. 66, p. 1668.) Mr. Connor did not have the figures showing the movement during this period over the Central Pacific Railroad. He believed that the tonnage which moved from this territory through New Orleans to California over the Southern Pacific Railroad ran as high as 65 per cent of the total movement from this territory to California (328).

He did not have the figures for the eastbound tonnage, but testified that in the fall and early winter there was a very heavy movement of canned fruits, dried fruits, lima beans, dried fish, and that class of commodities, and wine (330). He testified that there was a great variety of commodities moving from his territory in carload lots and innumerable others.

He testified that between 1899 and 1901 the tonnage from Pittsburgh via New Orleans and the Southern Pacific Railroad to California was in his judgment heavier than that moved from his territory to California (335), and that he thought that the annual tonnage from his territory to California via either the Southern Pacific Railroad or the Central Pacific Railroad in good years would be over 175,000 or 200,000 tons (336).

Mr. Sproule, the president of the Southern Pacific Company, testified that the volume of competitive traffic over the Central Pacific Railroad

and over the Southern Pacific Railroad is very large (241).

The New York representatives of the Union Pacific Railroad and connecting railroads testified to the same effect. (De Friest, 306; Johnson, 311; Hall, 312.)

From this testimony and from the exhibits it is apparent that the volume of competitive freight was at the time of the combination in 1899 and still is absolutely and relatively enormous.

THIRD.

THE COMBINATION IN FEBRUARY, 1899, UNREASONABLY RESTRAINED THIS COMPETITION.

It is admitted that since the combination pursuant to the plan of February 20, 1899, there has been no competition whatever between the Central Pacific Railway Company and the Southern Pacific Company. Indeed, the defendants contend that there never has been any such competition.

This contention is based upon the alleged prior existent unity of the two railroads. In fact, there never was any such unity. This is considered at length elsewhere (*infra*, p. 196).

This contention of the defendant is also based on the fact that at all times prior to February 20, 1899, this competition had been successfully restrained. This fact is immaterial. This subject is dealt with elsewhere (*infra*, p. 253).

The defendants contend that there is inconsistency in the position taken by the United States in the Union Pacific case and in the present case, because in the former case it was alleged that prior to 1901 there was competition between the Ogden gateway and the El Paso gateway, whereas in the present case it is contended that such competition was destroyed or prevented by the combination with the Southern Pacific Company in 1899. This statement of inconsistency is based on a false assumption as to the position of the petitioner in both cases.

In the Union Pacific case, the contention was not that prior to 1901 there was competition between the Ogden gateway, as such, and the El Paso gateway. The contention was that there was competition between the Union Pacific Railroad Company operating through the Ogden gateway, and the Southern Pacific Company operating through the El Paso gateway. There is nothing in this inconsistent with the contention that there was no competition by the Central Pacific Railroad Company under the control of the Southern Pacific Company for freight to be carried through the Ogden gateway.

In the present case, it is not contended that after 1899 there was no competition against the Southern Pacific Company for freight to be carried through the Ogden gateway, but it is contended that this competition was confined to the eastern connections of the Central Pacific Railroad, and that there was no competition by the Central Pacific Railroad. There is

nothing in this contention inconsistent with the contention for the petitioner in the Union Pacific case.

Actual competition at all times between the Ogden route and the El Paso route, or Sunset Gulf route, is referred to repeatedly by the witnesses for the defendant. This involves no qualification of the admission that there is no competition between the Central Pacific Railway Company and the Southern Pacific Company. It means only that the two railroads being open for business are inevitably inanimate competitors, or else that the eastern connections of the Central Pacific Railroad are competing for business which, if they get it, is carried part of the way over the Central Pacific Railroad. The immateriality of this is considered elsewhere (*infra*, p. 52).

It remains true that the Central Pacific Railway Company does not compete against the Southern Pacific. (Kruttschnitt 808; Munroe 374, 382; Lovett 292; Connor 336.)

This destruction of competition was a restraint of trade, as that term is used in the Act and repeatedly and consistently defined by this Court.

The contracts saved from the antitrust act by the rule of reason emphasized in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 67, and *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179–182, are those only which would not have been regarded as contrary to the common law as restraints of trade, namely, the "normal and usual contracts to further trade by resorting to all normal methods," "contracts essential to individual

freedom and the right to make which were necessary in order that the course of trade might be free." The court expressly disclaimed any intention to take out of the statute any contract or combination merely because it would have been more reasonable to permit such (221 U. S. 112). A combination between two naturally competitive railroads which relieves one completely from the competition of the other is contrary to the common law and is not a normal or usual method of trade or essential to individual freedom, and it is not made so by any imagined or actual advantages in saving of expense, in reduction of rates, or in increase of public convenience. The decisions after, as well as those before, the Standard Oil decision leave no doubt remaining as to this.

In *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, the court said:

> A combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act (85).
>
> The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute (88).

Whatever views may have been entertained as to the extent to which private individuals or companies may go in making agreements restraining their competitive efforts, there is no doubt that it is an unreasonable restraint for public service corporations to enter into combinations directly and substantially to deprive the public of the competition naturally existing between them.

> *United States* v. *Reading Co.*, 253 U. S. 26
> *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87.
> *United States* v. *Reading Co.*, 226 U. S. 324.
> *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61.
> *United States* v. *Terminal Association*, 224 U. S. 383.
> *Northern Securities Co.* v. *United States*, 193 U. S. 197.
> *United States* v. *Joint Traffic Association*, 171 U. S. 505.
> *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290.
> *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396, 408.

In *Gibbs* v. *Consolidated Gas Co.*, decided in 1889, the court, in defining the *common law* rule, said:

> The supplying of illuminating gas [compare railroad transportation] is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual

> effort. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, yet in the instance of business of such character that it presumably can not be restrained to any extent whatever without prejuduce to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy.

The combination of two competing lines necessarily, directly, and immediately prevents or destroys, to a substantial extent, the competition between them. The competitive effort between the two can exist no longer.

In the case at bar the restrictive effect of the combination is unusually great, because of the dependence of all other railroads upon the two railroads which were combined.

On February 20, 1899, California was a great railroad terminal for transcontinental freight. The California terminal facilities for all the railroads in the country were almost exclusively the rails of the Southern Pacific Railroad or of the Central Pacific Railroad. The only exception was the rails of the Atchison, Topeka & Santa Fe Railroad, which was first opened into San Francisco later in the same year.

If the Central Pacific Railroad and Southern Pacific Railroad were not combined, there would be competing terminal rails in the principal communi-

ties of California north of Bakersfield. These included, among others, Fresno, Tracy, Stockton, Niles, San Jose, Sacramento, and San Francisco Bay. With the two roads combined, these facilities are reduced to noncompeting ones, with the consequent effect both upon the public of California and upon the other transcontinental railroads. With the exception noted and because of the combination, one of these railroads, the Southern Pacific Company, controls all the distributing rails in all these cities and towns. The other transcontinental railroads in their competition with the Southern Pacific Railroad, were dependent upon it for terminal tracks in California. The facilities of these other railroads are rendered correspondingly unequal. To get an entrance advantageously into California they must obtain the consent of the Southern Pacific Company. This gives to the combination the same vice that was held unreasonable restraint of trade in *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383.

If the Southern Pacific Railroad Company and the Central Pacific Railway Company were owned and operated separately, and they made an agreement between them as to interstate business that rates should not be lowered, extensions built, service improved, or effort exerted by the one against the other to get business, except with the consent of both, the agreement would be contrary to the Sherman Antitrust Act, unquestionably. The com-

bination at bar is in essence such an agreement, but more effective.

The act of the Southern Pacific Company in acquiring all the stock in the Central Pacific Railroad Company and its successor, the Central Pacific Railway Company, inevitably ended, prevented and restrained any existing competition or possibility of competition between the two companies.

As the two railroads were not in a lawful unit ownership at the time of this acquisition (see *infra*, pp. 196–252), it was a restraint of trade because—

(1) These two separately owned railroads were about to become free of any restrictive, combined control;

(2) To prevent competition nonexistent but immediately threatened is a restraint of trade;

(3) This restraint is not validated by the competition of other railroads;

(4) There were no peculiar benefits to the public resulting from this restraint;

(5) The benefits derived from such a restraint do not exempt it from the provisions of the antitrust act; and,

(6) The public is injured by this restraint to as great an extent at least as by the other restraints of trade by common carriers which have been held unlawful.

1. *These two separately owned railroads were about to become free of any restrictive, combined control.*

On July 3, 1898, after years of congressional investigation and attempts at legislation, Congress passed

an act (30 St. at Large, chap. 571, p. 659) to create a commission to negotiate for the settlement of the debt of the Central Pacific Railroad Company to the United States, and directing the President of the United States to institute foreclosure proceedings if settlement was not made within one year.

At this time the Central Pacific Railroad Company had outstanding first mortgage bonds amounting to about $59,000,000, and owed the United States a debt of about $58,000,000, secured by a lien (second only to the first mortgage bonds) for the bonds and interest thereon which the United States had loaned to the company to pay for the construction of the railroad. The company had outstanding stock of a par value of about $67,000,000. This stock was owned, except to a very limited extent, by persons other than those interested in the Southern Pacific Company, and largely in small holdings in the United States and Europe. (See *infra*, p. 221.) The railroad was being operated by the Southern Pacific Company under a lease which was void and unlawful (see *infra*, p. 237), and which was also subject to destruction by the foreclosure of the Government lien, or by the foreclosure of the first mortgages.

The railroad had earned, on an average for 10 years, enough to enable it to pay interest at 4½ per cent or better on these mortgage and lien debts, but nothing for dividends on its stock. A sale of some sort on foreclosure proceedings to be begun before July 7, 1899, was inevitable. If the United States, or the stockholders, or anyone else bought

the railroad, the purchasers would hold the title free of any lease to the Southern Pacific Company, and this regardless of the validity or not of the lease.

The railroad was in existence, and equipped ready for operation. It was competitive with the railroad owned by the Southern Pacific Company, and immediately to fall into the hands of a competitor whose interests, as such, would cause vigorous competition.

It connected at Ogden with the Denver & Rio Grande Railroad and with the Union Pacific Railroad, and was the only access by rail for either to California, and was of enormous value to either or both of these railroads.

It was so vital to the business of these two railroads, that the Union Pacific Railroad Company, through the Oregon Short Line, inside of two and one-half years, acquired the controlling stock in the Southern Pacific Company, and claimed that it did so for the purpose of getting this access to California, and the Denver & Rio Grande Railroad and its ally, the Missouri Pacific Railroad, thereupon found it necessary to build a new parallel railroad (the Western Pacific) into California.

In this situation, the competition of the Central Pacific Railroad was no mere dream for the future. It was more immediately threatened than that of the undeveloped project, whose suppression was held to be unlawful in *United States* v. *Reading Company*, 226 U. S. 324.

The only way to stop this competition was for the Southern Pacific Company (Sproule, 242, 243), in defiance of the Sherman Antitrust Act, to acquire the railroad from its then owners.

The Southern Pacific Company's appreciation of the imminence and danger of this competition is shown by the price which the Southern Pacific Company was ready to pay for this railroad. By February, 1899, the first mortgage debt had become $59,453,000, and the Government second lien debt, $58,812,715.45—a total of $118,265,715.48. (Defendants' answer, Exhibit A, p. 47.) Its outstanding capital stock was $67,275,500. Its net annual operating income before the payment of fixed charges was $6,362,378.08. (Petitioner's Exhibit 35, p. 1634.) Its average net annual operating income before the payment of fixed charges for 10½ years had been $5,582,939.17. (Defendants' answer, Exhibit B, p. 71.)

During the preceding 15 years, the total dividends on capital stock had averaged four-fifths of 1 per cent a year, and during nine of these years, including the last five, no dividends had been paid.

The plan of reorganization under which the Southern Pacific Company acquired the property provided for:—

First mortgage 4 per cent, 45-year bonds	$100,000,000
Second mortgage 3½ per cent, 30-year bonds, first lien on sinking funds and lands	25,000,000
Four per cent cumulative preferred stock	20,000,000
Common stock	67,275,500
Total	212,275,500

This funding and capitalization was to provide no new money for the railroad, except that any part of the proceeds of the preferred stock not required for readjustment purposes, was to be used for improvements.

Notwithstanding this increase in funded debt, and this showing for earnings, the Southern Pacific Company agreed to purchase the common stock, par $100, at $125 per share, payable $100 in stock of the Southern Pacific Company and $25 in bonds of the Southern Pacific Company—a total of $84,094,500. In addition to this the Southern Pacific Company agreed to buy the preferred stock at par, and for this purpose to issue its own bonds as required to the extent of $20,000,000. This meant an expenditure by the Southern Pacific Company of $104,094,500 for stock in this corporation, subject to prior bonded debts of $125,000,000.

Nothing but the imminent danger of this competition could have warranted any such expenditure by the Southern Pacific Company.

The situation in 1899 was a repetition with greater emphasis of that which had led the promoters of the Central Pacific Railroad to secure in 1870 a controlling interest in the stock of the Southern Pacific Railroad Company. As to this, Leland Stanford, the president of the Central Pacific Railroad Company, testified before the Pacific Railroad Commission in 1887 that when the Southern Pacific Railroad Company was controlled by those having no interest in the Central Pacific Railroad Company—

> We early saw that if that line of railroad was completed—if it crossed the Sierra Nevada Mountains—all the valleys of the State would be open to it and it would be a very serious competitor of the Central Pacific. So we tried to control it, and we have succeeded in controlling it; and the consequence is that it has never been operated to the prejudice of the Central Pacific. It became a necessity, therefore, that we should control the Southern Pacific, and when opportunity offered we availed ourselves of it and purchased the controlling interest in that road. Since then the roads have worked in entire harmony, with all the advantages of a pooling arrangement, and the advantages resulting from our system of leases. (P. 99.)

This determination to restrain competition was in harmony with the attitude of these two companies during the entire period from 1870 to 1899, and thereafter.

The Central Pacific Railroad Company in its report for the year ending June 30, 1873 (D. Ex. 23, p. 1737), stated that the active competition with the California Pacific Railroad Company for the traffic between Sacramento and San Francisco was terminated by mutual agreement between that company and the Central Pacific Railroad Company, by which the latter guaranteed certain of the bonds of the California Pacific Railroad.

On September 28, 1883 (P. Ex. 18, p. 1421; P. Ex. 71, p. 1670), and on November 8, 1883 (P. Ex.

18, p. 1424; P. Ex. 72, p. 1671), and on December 1, 1887 (P. Ex. 63, p. 1661), these companies entered into agreements with the other transcontinental railroads not dissimilar to those held to be in restraint of commerce in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *United States* v. *Joint Traffic Association*, 171 U. S. 505.

These agreements provided for maintaining the rates in force or subsequently agreed to by the parties (P. Ex. 18, 19, pp. 1422, 1423, 1426), and that the railroads would bear proportionately the subsidy paid to the Pacific Mail Steamship Company, which was then operating a competitive line via Panama (P. Ex. 18, 19, pp. 1423, 1427), and for the control of rates by the unanimous action of a joint committee (P. Ex. 63, pp. 1662, 1663).

On October 1, 1889 (P. Ex. 24, p. 1480; P. Ex. 62, p. 1660), this association of railroads entered into a contract with the Pacific Mail Steamship Company by which the railroads guaranteed the gross earnings of the steamship company on its business between New York and San Francisco to be $75,000 per month (P. Ex. 24, p. 1481), and the steamship company gave the railroad companies the fixing of rates via the steamship company's lines (P. Ex. 24, p. 1481) and exclusive control of the business of the steamship company between New York and San Francisco (P. Ex. 24, p. 1482) and for the proportionate payment to the steamship company

by all the signatory railroad companies (P. Ex. 24, p. 1482).

At other times prior to 1887 these associated railroads bought or rented space from the Pacific Mail Steamship Company (Munroe, 388) to prevent competition from this line (Munroe, 389).

On December 6, 1895, the Pacific Mail Steamship Company, controlled by Mr. Huntington, the president of the Southern Pacific Company (Schwerin 694, 692), and operating by water from San Francisco to Panama, entered into a contract with the Panama Railroad Company, operating by rail from Panama to Colon and thence by water to New York (P. Ex. 25, p. 1484), not dissimilar to that held to be in unreasonable restraint of commerce in *United States* v. *Pacific & Arctic Company*, 228 U. S. 87. This agreement provided for the termination, in 1898, of the existing agreement of October 1, 1872, between the contracting parties (P. Ex. 25, p. 1485), and that the steamship company should have the exclusive privilege of through billing over the Panama Railroad (P. Ex. 25, pp. 1485, 1491), and for cooperation to prevent interference or competition (P. Ex. 25, pp. 1486, 1490), and for representation by the railroad company in making any rental agreement with the transcontinental railroads (P. Ex. 25, p. 1489), and that other connecting carriers should be charged full local rates (P. Ex. 25, p. 1490).

On June 11, 1900, about one year after the combination now complained of, the Pacific Mail Steam-

ship Company made another similar agreement with the Panama Railroad Company (P. Ex. 26, p. 1502) and a supplemental agreement (P. Ex. 27, p. 1517), which provided that if the railroad was prevented by pending proceedings in court from performing the exclusive through-billing provision of the principal contract (P. Ex. 27, pp. 1517, 1518) the parties would cooperate to procure a division of territory with other competitive steamship lines (P. Ex. 27, p. 1518), and if unsuccessful a new competing line south of Panama might be opened (P. Ex. 27, p. 1518) where these other steamship companies were then operating (P. Ex. 27, p. 1519).

When there was danger that the Texas & Pacific Railway Company would extend its line from the east toward California, there was a race of diligence by the Southern Pacific Railroad to head off this competition by extending its own line eastward as rapidly as possible. (Strobridge, 406, 415.)

The majority opinion in the district court seems not to take into consideration at all this imminence of competition in 1899.

2. *To prevent competition nonexistent but immediately threatened is a restraint of trade.*

It is as much a restraint of trade to take steps to prevent others from competing as it is to take steps to repress that competition after it has arisen. What the public is entitled to is the free flow of the competitive forces. Any unreasonable interference with these constitutes the restraint whether applied after

the competition has become well developed, or just before it is about to become so. It is the "potentiality of competition" (*Standard Oil Co.* v. *U. S.* 221 U. S. 1, 74) which should not be restrained.

In the case of railroads this potentiality, this restrainable competition, begins as soon as the project for the construction of the second line has progressed far enough to make its completion imminent. (*U. S.* v. *Reading Co.*, 226 U. S. 324, 348–352.)

In this sense the existence of competition is determined not by actual performance, but by the capacity for performance, if there is no restraint (*U. S.* v. *Union Pacific Railroad Co.*, 226 U. S. 61, 188 Fed. 102, 110, 121, 124; *U. S.* v. *Standard Oil Co.*, 221 U. S. 1, 70; 173 Fed. 177, 186.)

Even in an indictment for an attempt to monopolize commerce of a particular kind it is not necessary to allege that there is any commerce of this kind in existence. (*U. S.* v. *Patterson*, 59 Fed. 280, 283, C. C. Mass.)

In *United States* v. *Union Pacific Railroad Co.*, 188 Fed. 102, Adams, J., said:

> The contention of the Government in this particular, that a contract to strangle a threatened competition by preventing the construction of an immediately projected line of railway, which, if constructed, would naturally and substantially compete with an existing line for interstate traffic, would be in violation of the anti-trust law, may well be conceded. (*Id.*, p. 117.)

And Hook, J., said:

> This question involves the relative location of their lines on land and sea, and not only the parts they actually performed, but also those they were naturally capable of performing, in the movement of traffic. (*Id.*, p. 121.)
>
> Competition, as the antithesis of monopoly, is the influence which those in the same line of business have on each other, and that influence may as well be manifested in an existing capacity and preparedness as in the degree of active exercise. (*Id.*, pp. 124, 125.)

In *United States* v. *Standard Oil Co.*, 173 Fed. 177, 186 (C. C. Eastern District, Mo.), the court said:

> Those companies (the companies existing separately before 1890) were natural and potential competitors; but this group of stockholders held the power to prevent them from actively competing, and it is as incredible that they were actually doing so after they came under the control of that group as it is that the defendant corporations were engaged in actual competition during the nineties.
>
> For some time, therefore, before the transfer in each of these cases (the Northern Securities Company and the Standard Oil Company), a group of stockholders controlled a majority of the stock of potentially competitive corporations which they vested in the

> holding company, so that the latter had the power to operate them together without competition, and the rule which governs one must control the other.
>
> There is much more probability that corporations potentially competitive will separate and compete when each of their stockholders has a separate certificate of his shares of stock in each corporation, which he is free to sell, then when a majority of the stock of each of the corporations is held by a single corporation which has the power to vote the stock, and to operate them. (*Id.*, p. 189.)

In the opinion below in the present case the court says:

> That competition of the kind mentioned might now result from an enforced independence of the two companies, and a separation of the two railroads may be true, but we do not think that the statute was intended to create competition by destroying a proprietary relation formed long before its passage, and by the very means of which a railroad system has been brought into existence (2331).

In dissenting, Judge Carland says:

> As the breaking up of an unlawful combination does not create natural competition, but simply removes the barriers which prevent the free flow of interstate commerce, the concession that there might be competition if the combination was broken is also a concession

> that there is a natural competition which is suppressed by reason of the control of the Central Pacific by the Southern Pacific. * * *
>
> I do not think the evidence shows that the Central Pacific and the Southern Pacific were created originally and have always continued to be one system. They have always been and are now operated as separate systems (2337).

The majority opinion does not deal with the real contention made for the petitioner. It is not that a unit of ownership which has created two competitive forces without tending to suppress any competition by anybody should be broken apart so that those two forces can compete. On the contrary, it is that when two competitive forces have been created by two separate owners it is no less a restraint of trade to get them into one ownership that they have theretofore, through some device of common control, failed to compete. Particularly is this true if the device is about to terminate and the daily, active competition to begin

In this latter case both principle and, it is believed, the unbroken current of decisions in this court support the contention of the petitioner that to prevent the breaking out of immediately threatened competition is a restraint of trade

3. *This restraint is not legalized by the competition of other railroads.*

The defendants contend and have introduced evidence in the effort to show that competition is not restrained by the control of the Southern

Pacific Company over the Central Pacific Railroad because (1) the eastern connections of the Central Pacific Railroad are competing against the Southern Pacific Company for freight to be forwarded over the Central Pacific Railroad, and (2) the Atchison, Topeka & Santa Fe Railroad, and to a minor extent the Western Pacific Railroad and the Panama Canal routes are competing for transcontinental freight to and from California.

Even if this be so it is none the less true that the control of the Southern Pacific Company over the Central Pacific Railroad removes from the field as a competitor the Central Pacific Railway Company. This company is by far the most potent factor in California transcontinental transportation through Ogden. It is the initial or delivering carrier. This alone gives it greater influence than can be exercised by any of the intermediate carriers. (Connor, 345; Schumacher, 155; Chambers, 968; Sproule, 200, 213; Lovett, 301; Spence, 1158.) The line that has the terminals has the advantage. (Eshleman, 892.)

None of the other lines competing for freight through the Ogden gateway can get into California by rail without using the rails of the Central Pacific Railroad, except to the extent of the limited facilities furnished by the Western Pacific Railroad. On the other hand the Central Pacific Railroad has never been wholly dependent on the Union Pacific Railroad since 1883, the time at which the Rio

Grande & Western, now the Denver & Rio Grande, reached Ogden, forming a through connection to the east for the Central Pacific Railroad.

The Union Pacific Railroad has a means of getting into California by way of the Oregon Short Line and Oregon-Washington Railway & Navigation Company to Portland, and thence by steamer to San Francisco. While this is a rate-making factor, it does not appear that a pound of freight has traveled that way in the last 30 years, and it is unlikely that it will do so. All the evidence is to the contrary. (Connor, 341; Sproule, 235; Kruttschnitt, 768; Chambers, 960; Schumacher, 159, 171.)

The Union Pacific Railroad through the Oregon Short Line and the Salt Lake, Los Angeles & San Pedro Railroad has access to the southern part of California. It could reach San Francisco by boat from San Pedro. In the 12 years that the San Pedro Railroad has been in operation it does not appear that a pound of freight has moved this way. It is unlikely that any will so move. All the evidence is to the contrary. (Spence, 1159; Chambers, 961, 1131.)

For practical purposes the Union Pacific Railroad is absolutely dependent on the Central Pacific Railroad. (Schumacher, 157, 172; Spence, 1162; Kruttschnitt, 776.)

The power of the Pennsylvania or of any of the eastern trunk lines and of the Chicago & Northwestern Railroad or of any of the Iowa or central

lines when dealing with California freight is inconsiderable in comparison with the power of the Central Pacific Railroad, with its tracks at the door of the shipper or of the consignee. The tendency of injury to the public by being deprived of the competition of the Central Pacific Railway Company is scarcely affected by the efforts of railroads thousands of miles away.

The most powerful agency in the United States for competition in California against the Southern Pacific Company is restrained as long as that company holds the Central Pacific Railroad. (Connor, 346, 340; Schumacher, 150; Lovett, 295, 303; Munroe, 380; Sproule, 250; Kruttschnitt, 818; Chambers, 964, 975, 968; Eshleman, 896.)

The Atchison, Topeka & Santa Fe Railroad is the outgrowth of one branch of the plan of Congress to provide for three competitive railroads to the Pacific coast. (See *infra*, p. 198.) When one of those railroads (the Southern Pacific), is charged with restraining the competition of another (the Central Pacific), it is hardly an answer that it has not succeeded in controlling the competition of all of the railroad companies that exercise the franchises granted.

The Central Pacific route, with its eastern connections, is admitted by the defendants' witnesses to be the most powerful in California. (Chambers, 975.) There is no place of great importance in central and northern California which is reached by the Santa Fe and which is not reached by the Central Pacific or

the Southern Pacific. On the other hand, there are many places reached by these last two railroads which are not reached by the Santa Fe. In those places which the latter reaches, the Southern Pacific and the Central Pacific are the older railroads, and in much closer contact with the communities and with the industries served. The power of the Santa Fe is hardly comparable with that of the Southern Pacific.

The contention that the competition of the eastern connections of the Central Pacific and the competition of the Santa Fe legalized the restraint of the competition of the Central Pacific Railroad by the Southern Pacific Company has been authoritatively disapproved by this court in *United States* v. *Union Pacific Railroad Company*, 226 U. S. 61.

The same contentions were made there. (Mr. Dunne's brief, pp. 164, 107, 108; Mr. Loomis's brief, pp. 96, 90; Mr. Dunne's brief, pp. 38, 81, 97, 99, 108; Mr. Loomis's brief, p. 88.) The court below in that case was apparently convinced of the correctness of the argument (188 Fed., 119), but it was disapproved in the Supreme Court.

The argument was at least equally applicable in that case, and this, whether the cases be compared with reference to the respective dates of the combinations complained of, or with reference to the respective dates of the decrees in the two cases.

The combination complained of in the present case was made in February, 1899, and that complained of in the Union Pacific case was made in 1901. The

decree in the present case was entered in March, 1917, and that in the Union Pacific case was entered June 30, 1913.

The alleviating competition of the Santa Fe Railroad was greater in 1901 than it was in February, 1899. The through line of the Santa Fe extended to Mojave in the southern part of California only in February, 1899. It was extended north in July of that year. It began to exercise a powerful and growing influence upon competition. By 1901 it was a much more considerable factor than in 1899.

In 1899 the only line operating from California by way of the Isthmus of Panama was the Pacific Mail Steamship Company, which was controlled by the president of the Southern Pacific Company. (Schwerin, 692, 694.) In 1901 this company was still operating, and the American-Hawaiian Steamship Company was also operating by way of the Straits of Magellan.

In 1899 and in 1901 the only interstate railroads reaching California were the Southern Pacific and the Central Pacific and the Santa Fe.

In 1913, when the decree was entered in the Union Pacific case, all the additional interstate railroads to California which have now been opened had then been opened. These additions are the Salt Lake, Los Angeles & San Pedro Railroad and the Western Pacific Railroad. The former was opened in 1905 and the latter in 1910. They were both extensively considered in the Union Pacific case.

The defendant in the present case has called attention to the fact that upwards of 50 railroads maintain soliciting offices in Californa and in New York for transcontinental business. (D. Ex. 58, p. 2242; D. Ex. 59, p. 2243; D. Ex. 56, p. 2242). Substantially all of these maintained these offices in New York and in California at the time of the Union Pacific merger in 1901 (Spence, 1144), and certainly there were no more such offices at the time of the combination in 1899 now complained of than there were in 1901.

The witnesses for the defendants who say that the competition of these other railroads requires the Southern Pacific Company to maintain good service over the Central Pacific Railroad say also that that competition required the Union Pacific Railroad also to do so during the time of the merger. (Chambers, 968; Kruttschnitt, 775, 773.)

There was no lessening of effort during the merger period to get as much freight as possible from the Atlantic seaboard via the Sunset Route. (Chambers, 968; Spence, 1125–1131; Sproule, 198.) During that period the effort in the Middle West was kept up with the boundary moved from a line from St. Louis to Detroit to a line along the Ohio River. (Lovett, 289; Munroe, 374; Sproule, 198; Lincoln, 113, 114; Schumacher, 150; Connor, 354, 330.)

Mr. Krutschnitt says that there was no change of policy (729) during the merger period beyond a gradual improvement, and that the Union Pacific Railroad had no greater control of competition than

the Central Pacific had. (Chambers, 968; Kruttschnitt, 776, 741–775.)

When this combination was made (Feb. 20, 1899), California was a great railroad terminal for transcontinental freight, and the terminal facilities for all the railroads of the country were the rails of the Southern Pacific Railroad or of the Central Pacific Railroad, except at the points reached by the Santa Fe south of Mojave. The combination of these terminals into one ownership (compare *U. S.* v. *Terminal Railroad Ass'n. of St. Louis*, 224 U. S., 383) could not be rendered harmless by the fact that other railroads were competing for freight to forward over one or the other of these terminals. Had the law been otherwise the decision in the case against the Union Pacific Railroad Company must of necessity have been otherwise.

It is not the total annihilation of competition which the antitrust act makes the test; it is the unreasonable restraint of competition.

There is such an unreasonable restraint when one company acquires control of two existing competitive railroads. (*U. S.* v. *Union Pacific Railroad Co.*, 226 U. S. 61, 85; *Northern Securities Co.* v. *U. S.* 193 U. S. 197.)

It is no defense that much other competition may remain.

In *U. S.* v. *Union Pacific Railroad Company*, 226 U. S. 61, the court said:

> A combination which places railroads engaged in interstate commerce in such relation

as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act (85).

The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute (88).

To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute (87).

In *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, the court said:

> Every combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce * * * is made illegal by the act.
>
> To vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly.

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 16, the court said:

> All the authorities agree that in order to vitiate a contract or combination it is not essential that its results should be a complete monopoly; it is sufficient if it really tends to

> that end and to deprive the public of the advantages which flow from free competition.

This was followed in *United States* v. *Chesapeake & Ohio Fuel Co.*, 105 Fed. 93, 105 (C. C. S. D. Oh.); in *United States* v. *MacAndrews*, 149 Fed. 823, 833 (C. C. S. D. N. Y.); in *Bigelow* v. *Calumet & Hecla Mining Co.*, 155 Fed. 869, 875 (C. C. W. D. Mich.); and in *United States* v. *Swift*, 188 Fed. 92, 101 (D. C. N. D. Ill.).

In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 237, 243, the court said:

> The defendants were by their combination therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors.
>
> Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade (244).

In *United States* v. *Northern Securities Co.*, 120 Fed. 721, 726 (C. C. D. Minn.), the court said:

> The point involved is whether the ownership of all of the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition be-

> tween such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership.

In *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed. 610 (C. C. A. 6th), 623, the court said:

> It is further contended that the competition is such in the market for which this coal is intended, and the coal produced by the operators, parties to this agreement, is such a small fraction of the quantity sold that it can not affect prices materially. It is not required, in order to violate this statute, that a monopoly be created. It is sufficient if that be the necessary tendency of the agreement.
>
> The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain or impair the freedom of interstate trade. The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust," which shall control the production and sale of a commodity (624).

In *Monarch Tobacco Works* v. *American Tobacco Co.*, 165 Fed. 774, 781 (C. C. W. D. Ky.), the court said:

> The act does not appear to require that the restraint of interstate trade and commerce shall be so complete as to amount to total destruction.

In *United States* v. *Standard Oil Co.*, 173 Fed. 177, 184 (C. C. E. D. Mo.), the court said:

> Any contract or combination of two or more parties, whereby the control of such rates or prices is taken from separate competitors in that trade and vested in a person or an association of persons, necessarily restricts competition and restrains that commerce.

In *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 191 (D. C. N. D. N. Y.), the court said:

> It is no defense for such a combination to show that there is still some competition and some competitors, and that the acts of the combination do not wholly and entirely control interstate commerce in the article, or absolutely fetter it.

In *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 741, 743 (D. C. N. D. Oh. E. D.), the court said:

> A combination which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act.
>
> It is not necessary to a violation of the Federal statute that a complete monopoly of all towing on the Great Lakes be effected. A monopoly in 14 ports is as offensive against the act as a monopoly in 50 ports.

In *U. S.* v. *Reading Co.*, 226 Fed. 229, 271 (D. C. Pa.), it was held that a combination of two companies whereby 20 per cent of the anthracite coal production and 35 per cent of the anthracite transportation to the same market was consolidated into one control was a restraint of trade, notwithstanding the remaining effective competition, which controlled 80 per cent of the production and 65 per cent of the transportation.

In *U. S.* v. *Reading Co.*, 253 U. S. 26, this portion of the decision is unanimously approved.

Congress reaffirmed this principle in 1914 in section 7 of the Clayton Act (38 Stat. 730), providing that—

> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition *between such corporations*, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. [Italics not in original.]

4. *There were no peculiar benefits to the public resulting from this restraint.*

(*a*) *The benefits claimed.*—The defendants contend that there would be an injury to the public in dissolving this combination because it would (1) compel the construction and maintenance of separate terminals at common points; (2) prevent the interchange-

able use of the tracks of the two companies; (3) introduce two-line hauls, with consequent increase in rates for one-line hauls.

The stimulant of advocacy and self-interest always tends to overemphasis of objections. They are tenable in all cases of restraint of trade by combination between two railroads. The economic savings of monopoly are constantly being urged in its favor. The arguments are not peculiar to this case, and have no peculiar basis in the facts of this case.

(*b*) *Securing these benefits by agreement.*—All of these difficulties would be overcome or minimized by the natural, practical operating methods that would be employed by railroads seeking economies. This is strikingly illustrated by an occurrence with respect to the two railroads in question.

Upon the decision of the Supreme Court in December, 1912, in the case of the *United States* v. *Union Pacific Railroad Company* (226 U. S. 61), the Attorney General became convinced that, as an inevitable consequence of that decision, the control of the Central Pacific Railroad by the Southern Pacific Company was an unlawful restraint of trade, and he informed the officials of the Southern Pacific Company that if the Southern Pacific Company did not dispose of the stock in the Central Pacific Railway Company he would, in the performance of his duties, file a petition against the Southern Pacific Company for a dissolution of this combination. (Kruttschnitt 785.) The Southern Pacific Company was reluctant to make this voluntary

dissolution of the combination, but nevertheless they took up negotiations for it with the Union Pacific Railroad Company, and under date of February 8, 1913 (P. Ex. 20, p. 1428), the Southern Pacific Company, the Union Pacific Railroad Company, the Central Pacific Railway Company, the Southern Pacific Railroad Company, and the Oregon Short Line Railroad Company entered into an agreement for the purchase by the Union Pacific Railroad Company of the stock of the Central Pacific Railway Company.

This agreement provided for a lease by the Central Pacific Railway Company to the Southern Pacific Railroad Company of the railroad from Tehama to the northern boundary of California, and for the conveyance by the Central Pacific Railway Company to the Southern Pacific Railroad Company of the railroad running north from Weed through Natron (thereby giving the Southern Pacific Company control of a through railroad from San Francisco to Portland, Oreg.), and for the joint use by the Southern Pacific Company and the Central Pacific Railway Company of the railroad controlled by the Southern Pacific Company from Sacramento through Benicia and Port Costa to Oakland, and for trackage rights to the Central Pacific Railway Company over the Southern Pacific Railroad from Redwood to San Francisco, and for the joint use by the two companies of the Central Pacific Railroad from Newark to Redwood, and for general interchange of traffic, and for the joint use of terminals, and for repairing and maintenance of rolling stock of the Southern Pacific Company at the shops of the Central

Pacific Railway Company in Sacramento, Oakland, and elsewhere.

The agreement was made conditional upon approval by the California Railroad Commission of the leases and conveyances of railroads in California, and of the contracts for joint use of terminals, and for trackage rights.

On February 7, 1913, the railroad companies applied to this commission for approval, and a week later this approval was granted, but subject to the conditions that the price of the property sold, or its valuation, should be subject to approval of the commission; that the rates of fare within the State of California should not be increased because of the altered conditions; that the term of the lease of the railroad from Tehama north should be 50 years, and thereafter subject to the approval of the commission; and that if the joint use of the Benicia cut-off was granted, then other railroads should be granted similar rights on equitable terms.

No attempt was made to comply with these conditions, and the plan was abandoned, with the result that this suit was begun about a year later. Mr. Sproule, the president of the Southern Pacific Company, testified that the commission's view at the time was that the trade was in some way collusive and not a bona fide separation of the properties (253).

Mr. Eshleman, formerly president of the commission, testified that the view of the commission was that the particular agreement did not restore com-

petitive conditions, and that it left the Union Pacific Railroad Company (893) in more complete control than it was before the decision against it, in that the agreement gave that railroad the exclusive joint use with the Southern Pacific Company of the Benicia cut-off from Sacramento to Port Costa, and of the terminals of the Southern Pacific Company. He stated that this objection was not intended to cover the exclusive joint use of terminals separated by decree of court if the same terminals had been used jointly by the same roads before that separation (893), and that the decision was not intended as a precedent for the case of the Central Pacific Railroad Company and the Southern Pacific Railroad Company if the combination between them was dissolved (893).

The agreement is of value in the present case as showing how completely it proved to be possible to overcome the difficulties of a dissolution if the parties in interest were minded to do so.

The joint use of terminals by two or more railroad companies at common points is a frequent occurrence. (Chambers, 976.) The Southern Pacific Company and the Central Pacific Railway Company are admittedly in an excellent position to bargain with each other for such use. (Kruttschnitt, 821, 777.) It would not be novel in the experience of these companies. The Central Pacific Railroad and the Union Pacific Railroad have had a joint terminal at Ogden for 48 years. (Kruttschnitt, 819.) The Southern Pacific Railroad and the Santa Fe

have had a joint use of the terminal at Mojave for years. (Kruttschnitt, 771.) A similar arrangement between the Central and the Southern would be natural, businesslike, and feasible. (Kruttschnitt, 800, 770; Chambers, 976, 977.)

The joint use of necessary connecting tracks by two or more railroads is common. The Southern Pacific Railroad and the Santa Fe have had such a joint use of the track from Mojave to Bakersfield for 18 years. Prior thereto there was a contract between these two railroads under which the Santa Fe had the right to operate its freight trains and engines over the tracks of the Southern Pacific Railroad and into the terminals of that company. (Chambers, 955.) The arrangements between the two roads have worked satisfactorily. (Kruttschnitt, 769, 770.)

The use of the Benicia cut-off by the Central Pacific Railway Company and of the railroad from Tehama to the northern boundary of California by the Southern Pacific Railroad Company for through trains is entirely feasible. (Chambers, 987, 976.)

The other tracks of these two railroads could by agreement between them be used interchangeably for the local service without its interfering in any degree with the competition between them for the interstate transportation as to which they are competitive. (Chambers, 976, 978.)

(c) *The benefits overstated.*—The extent to which the defendants have colored the disadvantages of having this restraint dissolved is strikingly illus-

trated by Mr. Kruttschnitt's testimony with reference to saving expense. He says that the Central Pacific Railroad Company now gets its fuel hauled by the Southern Pacific Company for nothing, and that the Southern Pacific Company now gets its ties and lumber hauled by the Central Pacific Railroad for nothing, whereas each would have to pay for these services if the two roads were separate. He made no comment, until cross-examined, upon the fact that the saving of expense to the one railroad was a corresponding loss of revenue to the other, and that the actual cost of the service was not affected. (Kruttschnitt, 820, 744.)

The defendants have introduced testimony to show that there would be a chance of increased rates for transportation within the State of California because railroad commissions allow a higher rate on a two-line haul than on a single line haul between the same points. Admittedly, this principle would not operate where there was a competitive railroad, such as the Santa Fe, to perform the same service. (Eshleman, 880; Chambers, 977.) No effort whatever has been made by the defendants, although in possession of the statistics, to show the comparative volume of the freight which might be injuriously affected if such an increase of rates was allowed. They take lumber as a specific illustration and say that lumber amounts to 18 per cent of the total volume of their freight. Of this it appears that only about one-seventh is transported within the State (Eshleman, 886), and most of this fraction would not be subject

to a two-line haul if the combination was dissolved. The great bulk of it would first reach whichever one of them was the delivering carrier. (Eshleman, 887.)

The whole theory that there would be any increase in rates for two-line hauls on this dissolution is well shattered by defendants' witness, Mr. Chambers. He says of the similar case of a combination between the Southern Pacific and the Atchison:

> If the Atchison and the Southern Pacific should enter into joint operation, it would not have the effect to materially reduce the rates in California between points that require the two services (977).

This is equally applicable to the Central Pacific and the Southern Pacific.

There is another instance of a disposition to overpress argument in Mr. Kruttschnitt's misapplication of the language used by Judge Hook in *United States* v. *Union Pacific Railroad Co.*, 188 Fed. 102, 120. In concurring with the majority in holding that the petition ought not to prevail with respect to the acquisition of the one-half interest in the San Pedro line by the Union Pacific Railroad Company, Judge Hook called that line "tangential." Mr. Kruttschnitt, in the present case, described the line of the Southern Pacific as a through line from New York or New Orleans to Portland, Oreg., with another line from San Francisco to Ogden, a divergent stem or tangential offshoot (736), and stated that he considered this quite an accurate description (773, 803). He even hesitated to describe the Central Pacific Rail-

road as a main trunk line (774), but finally consented to do so (774). No one familiar with the situation could doubt for a moment but that the Central Pacific, with its eastern connections, was one main transcontinental trunk line and that the Southern Pacific was another. Neither is a tangential offshoot or divergent stem of the other.

These incidents throw light on the weight to be given the *opinion* evidence offered for the defendants as to the effect of a dissolution upon *future* operations.

The only lines of either railroad which do not connect directly with the other lines of the same company (Kruttschnitt, 798, 799, 819) are (1) the lines of the Southern Pacific Railroad in Oregon which are reached over the Central Pacific Railroad from Tehama to the boundary of Oregon; (2) a short line of the Central Pacific Railroad from Eugene to Oak Ridge, Oreg., which is part of a projected, contiguous through line of that railroad, of which about a hundred miles remain to be completed (Kruttschnitt, 797); and (3) some short branches of the Southern Pacific Railroad springing from the Central Pacific Railroad between Fresno and Sacramento. The isolation of the Oregon lines is substantially no greater than that of all the Santa Fe lines north of Bakersfield. These are isolated from the rest of that company's system by about 70 miles of track of the Southern Pacific Company. (Kruttschnitt, 800, 803.)

(*d*) *Eleven other dissimilar railroads.*—The defendants, over the objection of the petitioner, have put in evidence maps of 11 railroads having alternative

freight routes. (D. Ex. 84–94; pp. 2256–2257; Kruttschnitt, 737, 817; Spence, 1142, 1153.)

It is not clear on just what principle of law the defendants conceive this evidence to be admissible. It seems to be offered as a sort of bogie of the difficulties in store for the Department of Justice and for the court if the restraint of trade by the Southern Pacific Company is dissolved. The evidence has no bearing whatever upon the present case. If these 11 railroads are restraining trade, such restraint should be stopped. If they are not restraining trade, they are not like the Southern Pacific Company. On the evidence presented, concerning these 11 other railroads, it does not appear that there is any restraint of trade by any one of them, unless it be possibly the New York Central Railroad. (Spence, 1142.) None of the alternative routes of these 11 railroads are shown to have been acquired when they were already competitive routes. None of them are shown to have been projected, built, or acquired to prevent the imminent competition of some other railroad or projected railroad. In these respects they all differ essentially from the combination made by the Southern Pacific Company.

It is worthy of note that if the existence of these 11 railroads establishes that the combination made by the Southern Pacific Company in 1899 was lawful, it establishes equally that the combination made by the Union Pacific Railroad Company in 1901 and by the Northern Securities Company in 1901 were lawful.

As the court held otherwise as to these two combinations, it has thereby decided the immateriality of the evidence offered.

The offer of this evidence is but one more indication of the determination of the defendants to confuse the case of a railroad having two alternative routes obtained without the restraint of any competition with the case of two railroads having competitive routes which can not be made the alternative routes of one railroad except by the acquisition of the two by one, and hence by a restraint of trade by the suppression of competition.

(*e*) *The resolution of the board of directors of the San Francisco Chamber of Commerce.*—The defendants have put in evidence a resolution (D. Ex. 22, p. 1702) adopted by the board of directors of the San Francisco Chamber of Commerce. This board consists of 21 members, and 11 are necessary for a quorum. It does not appear how many voted. A careful examination of the secretary, through whom the resolution was offered, failed to recall to his mind the authorship of the resolution. It was filled with erroneous statements of facts (Lynch, 849, 850) and contained a confident expression of opinion formed apparently without legal advice (Lynch, 842, 843) as to the lawfulness of this combination, and contrary to the opinion of the Attorney General. (Lynch, 843.) It was strikingly similar in phraseology to the language employed by the Southern Pacific Company and its employees and representatives in the answer in this case and elsewhere. (Lynch, 849.) The sec-

retary stated that many of the alleged facts for the resolution were obtained from the newspapers and from the office of the Southern Pacific Company. As the secretary could not remember who drew the resolution, and as none of the directors who participated in passing it testified, the petitioner is unable to assert who or what inspired this resolution (Lynch, 838, 849, 856, 860, 862); but it is not difficult to see how easy it would be for men as influential in San Francisco as those connected with the Southern Pacific Company to persuade the directors of the Chamber of Commerce by an *ex parte* argument.

That some such influence may have been at work is further evidenced by the fact that the resolution was passed without any consultation with the chamber's natural expert advisor, the head of the transportation department (Lynch, 857), and that the body had gone on record publicly as favorable to the dissolution of the Southern Pacific-Union Pacific merger (Lynch, 865), and before the California Railroad Commission had favored the separation of the Central Pacific Railroad from the Southern Pacific Railroad (Eshleman, 898) with its attendant advantages of competition in lower rates and better service. (Eshleman, 897, 896.)

The absolute immateriality, if not effrontery, of such a resolution as this when introduced in evidence requires but little comment. The Attorney General of the United States, convinced that the Southern Pacific Company is restraining trade, has in pursuance of his duties, filed this petition. If trade has

been restrained the petition should prevail. If it has not been restrained it should be dismissed. Whether or not there is a restraint is a question of fact or of law to be resolved by a consideration of evidence. The restraint is not to be found or to be ignored because a group of the residents of San Francisco think that it would be a good scheme to have the restraint continue; and their opinion upon the subject, not in court, not under oath, not submitted for cross-examination, and expressed for undisclosed motives or solicitation, is not helpful in the solution of any question of fact or law in the case.

There is probably not a community in the country where there can not be found a goodly number of people who believe that monopolies in railroad transportation with the resultant conveniences in daily transactions are better than competition, and who overlook entirely the ultimate injury to themselves and the general public interest coming from the lack of competition. In any such community a resolution against the dissolution of combinations in restraint of trade by two railroads can be secured quickly and with little effort.

This involves the question of the policy of the Sherman Anti-trust Act, which this court has always said is for Congress and not for this court to determine. Much more is it not for a small group of citizens here or there to determine.

(*f*) *Complaints by shippers, by the public, and by the California delegation in Congress.*—With respect to this same subject the majority opinion below says that

this case "finds little, if any, support in testimony from complaining shippers or the public generally." This is true, because the competitive character of the two railroads and the total absence of competition between them was so evident on the testimony of the defendants' own officials that it seemed useless to enlarge the record by constant reiteration from shippers.

Whether competition is restrained or not, and to a substantial degree, is not to be determined by the complaints of shippers or of the public. It is to be determined by evidence of the facts. If, on the evidence, it is not restrained, the complaints of shippers and of the public are of no assistance. If it is restrained, their complaints are immaterial.

As Judge Carland says in his opinion, "the Attorney General in instituting this action represents the public, including shippers."

The duty and the authority to make complaint of a restraint of trade is imposed upon the Attorney General, and it is not left in the hands of shippers and the public.

The opinions in the Union Pacific case and in the Northern Securities case, and in the other cases of combinations of competing railroads, rest the decisions on the facts of the several cases, and not on any complaints of shippers or of the public. In the Union Pacific case there was evidence of the competition between the Southern Pacific Company and the Union Pacific Company prior to 1901, and there was evidence of the reduction in that competition after

1901, and this evidence came from witnesses some of whom were railroad men, and some of whom were shippers, but it was no more convincing than is the evidence which in the present case comes from railroad men alone, particularly from the defendants' own officials. In the Union Pacific case there was no evidence of complaints either of shippers or of the public.

It would be most unfortunate and without precedent if the enforcement of the criminal law of the country not merely must wait until there was general complaint from the public or any particular class of it, but also must depend on introducing these complaints in evidence to secure conviction or preventive relief.

If the complaints are of importance, then it is of importance to consider that in 1896 (D. Ex. 37, p 1938, 54th Congress, 1st sess., H. R. Report No. 1497), two years and four months after the Central Pacific Railroad Company made the lease to the Southern Pacific Company under which it is now operating, and two years and 10 months before the Southern Pacific acquired the stock of the Central Pacific Railroad Company, it was stated in the minority report of the Committee on Pacific Railroads that—

> All the California delegation, with one exception it is said, are a unit against any refunding which will vest both these roads, the Southern Pacific and the Central Pacific, in the same control; that is, in the present control. They contend that the case is within the principle

> that has given rise to the prohibition in the constitution and laws of so many States to any leasing or consolidation of parallel or competing lines, and within the principle of the antitrust law of Congress, and that in this instance that monopoly has exerted the oppression for the prevention of which the laws referred to were enacted. They suggest that either the Government, without actually operating the Central Pacific, maintain it as a sort of a railroad turnpike, for the use of any or all other companies, or that the road be sold to the purchasers of the Union Pacific or any other company that will afford competition with the Southern Pacific.

This protest should be given as much weight certainly as the complaints of any shippers or the action of the directors of a chamber of commerce.

(*g*) *The disadvantages.*—Offset against the various objections which the defendants have urged are the benefits to be derived from having the law respected, the restraint of trade removed, and the advantages of competition provided.

Common knowledge and common experience are that normal competition is to the public advantage.

> *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646, 676.
>
> *U. S.* v. *Union Pacific Railroad Co.*, 226 U. S. 61, 88.

There is peculiar advantage in securing competition by the Central Pacific Railway Company. It is the most important railroad entering California. It is

the "key" to California. (D. Ex. 23, p. 1738.) The Union Pacific Railroad and all its eastern connections are in the common and practical sense absolutely dependent upon it. (Sproule, 235, 236, 246; Lovett, 296; Chambers, 968; Kruttschnitt, 776, 778; Connor, 341; Munroe, 379, 380; Schumacher, 157, 172; Spence, 1162.) It has, of course, its route through Portland, Oreg., as a rate-making factor or instrument of strategy (Sproule, 235; Connor, 340; Kruttschnitt, 767; Chambers, 960; Schumacher, 159, 171), and also access to the limited facilities of the Western Pacific Railroad. But for the practical securing and carrying freight in competition, both in time, service, and expense, it is dependent on the Central.

The initial or terminal line is more powerful than the intermediate lines. (Connor, 177; Schumacher, 155; Lovett, 301; Spence, 1158; Chambers, 970, 974, Sproule, 200, 213). The line that has the terminals has the advantage. (Eshleman, 892). The Central Pacific is with respect to California freight in a more powerful position than the Union Pacific. (Kruttschnitt, 777; Chambers, 969.) The Union Pacific could not put into operation any plan for improved service which might enable it to compete with the Southern Pacific route without the consent of the Central Pacific. (Sproule, 240.) The welfare of the Union Pacific is dependent upon the attitude of the Southern Pacific toward the Ogden and the El Paso gateways. (Spence, 1162.)

The Southern Pacific Company is a very powerful road and looked upon as such in California. (Con-

nor, 329.) Its representative used to be looked upon as "boss." The other railroads usually did what he wanted because they could not get through rates and through service in any other way. (Schumacher, 154.)

There has been an improvement in the service over the Central Pacific Railroad, but, as far as appears, not in excess of that in the service over the railroads of the country generally; and by far the largest part of any improvement that has been made by the Central Pacific since the opening of the Southern Pacific through route in 1883 is that which was made between 1901 and 1913, when the Union Pacific Railroad Company was in control of the Central Pacific Railroad. (Munroe, 379; Kruttschnitt, 814, 815; Chambers, 979; Schumacher, 152.)

The development of the Central Pacific Railroad virtually stopped from the time that the promoters of it acquired control of the Southern Pacific Railroad Company and until the Union Pacific Railroad Company, with its incentive to improve the Ogden route, got control of the Southern Pacific Company.

The Central Pacific Railroad's main line was completed in 1869 (a year before its promoters acquired control of the Southern Pacific Railroad Company), and branches north and south were constructed. The branch north was carried to Redding in 1872, and extended as far as the Oregon line in the next 15 years. The branch south was stopped at Goshen in 1872. All lines subsequently

built up to 1901, whether or not branches of the Central Pacific were built for the Southern Pacific.

After the Union Pacific Railroad Company acquired control of the Southern Pacific Company in 1901, the lines built or acquired contiguous to the Central Pacific became the property of the Central Pacific Railway Company. (P. Ex. 42, p. 1639.) These included the line from Niles to Redwood across the southern arm of San Francisco Bay; the line from Weed through Kirk and Oakridge to Natron, Oreg., except the portion from Kirk to Oakridge not yet constructed; the line from Fernley to Susanville; and the line from Hazen, Nev., to Mojave, Calif.

There can be little doubt that if the Central Pacific Railroad Company had been free from the control of those interested in the Southern Pacific Railroad Company, it would have developed many branch lines and feeders between 1870 and 1901. (Chambers, 972.)

The failure of the Central Pacific Railroad Company to develop through freight service via Odgen was one of the striking results of the greater interest felt in developing the through Southern Pacific route. It is particularly noticeable by comparison with the accomplishments of the Atchison, Topeka & Santa Fe Railroad Company. The Central Pacific Railroad went into operation for through transcontinental business in 1869. It then had as complete a connection to the Atlantic Ocean as it now has. The Santa Fe Railroad did not have any connection to any part of California until 1883. It was 14 years

junior to the Central Pacific. Even in 1883 and for 16 years thereafter it extended to the southern part only of California. Yet it was the Santa Fe Railroad that first developed the system of through billing between California on the west and the middle west and Atlantic seaboard on the east. (Chambers, 943, 958, 959; Spence, 1118, 1124.)

Some effort has been made to suggest that the failure of the Central Pacific Railroad to institute this through billing was due to inability to get the cooperation of the eastern connecting lines (Spence, 1117, 1122), but no evidence has been offered to show that there was any unwillingness on the part of the eastern lines to cooperate in this way, and the Santa Fe secured the cooperation and secured it about 1889, or within six years of the time when the line was opened to the southern part of California. The Santa Fe service was an incitement to better service over the Central Pacific Railroad. (Chambers, 971.) Undoubtedly the failure of the Central Pacific Railroad to institute through billing by way of Ogden was due to the fact that those in control of the operations of the Central Pacific Railroad were interested to a greater extent in the Southern Pacific Railroad, which secured 100 per cent of the rate on freight moving via this route to and from the Atlantic seaboard, whereas the Central Pacific Railroad Company secured only about 25 per cent of the rate on freight moving via Ogden. On freight to Middle West territory the disparity in percentage was not so great, but was very substantial. The impairment

of the service on the Central Pacific would help to give business to the Sunset Route. (Chambers, 950.)

The difficulty with bringing the all-rail service into shape equal to the Sunset service was not with the eastern lines but with the lines west of Omaha and west of the Colorado junctions. (Chambers, 980.)

The Sunset Route would never have been able to secure a substantial share of the traffic between Atlantic seaboard and California if the Southern Pacific's short line had been to Los Angeles, or to the southern boundary of California, and its longer haul to Ogden; or, in other words, if the influence of the Southern Pacific upon that traffic had been exerted in favor of the Ogden haul the Sunset Route could never have made the progress that it did in getting business. (Spence, 1117.)

This through billing has been a great addition to the service. (Chambers, 943.)

This is only one of the impairments of service attributable to the lack of an undivided interest in the success of the Central Pacific Railroad Company, and the lack of normal competition by those in control of that railroad.

Competition always tends to an improvement in service and to a reduction of rates. Evidently this is not the time nor the place to present evidence of particular rates or particular items of service. The Interstate Commerce Commission is the body to deal with such matters. The destruction of normal competition is the injury complained of without going

into the special or peculiar injuries compounded upon that injury. The evidence bears out the common understanding of the seriousness of the injury.

The more competition the better the service the public will get; and to some extent, as a practical matter in railroading, the control of two lines by one company operates by so much as a restraint upon the competition. (Schumacher, 156.) It would help the volume of traffic passing over the Central if they had their own organization in San Francisco. (Schumacher, 157.)

Except so far as the Interstate Commerce Commission is able to exercise control (after the expense of time and money incident to applications to it), the rates to and from California are now controlled by the Southern Pacific Company and the Santa Fe. (Lincoln, 110, 129.) In February, 1899, they were controlled by the Southern Pacific Company. (Schumacher, 154; Kruttschnitt, 781; Stanford, 100; Chambers, 964; Lincoln, 111.)

If the Central Pacific were separated from and independent of the Southern Pacific control, and assuming that the Central Pacific is controlled by the motives that ordinarily control people, it would work very actively for business by way of the Ogden gateway and its connections east, while the Southern Pacific would work very actively for it by way of the El Paso gateway, much more so than is now the case. (Lovett, 293, 294.) The Soutern Pacific now controls all of the rail transportation in central Cali-

fornia except that controlled by the Santa Fe and Western Pacific. (Lovett, 294.) If the Central Pacific were separated, if it were independent, both the Central Pacific and the Southern Pacific would be in San Francisco, Oakland, San Jose, Stockton, Sacramento, Fresno, and all other towns and places in central California contending for traffic—one for the Ogden gateway, and the other for the El Paso gateway—and it would affect all that competition and would make competitive practically all the traffic of that territory going east. (Lovett, 303.) The increase of effort in the way of competition for the competing traffic would have the tendency to increase the quality of service. That is what always has been the result of competition—improvement in service. (Lovett, 297.)

The Interstate Commerce Commission, Mr. Chambers says, has taken no part in the reduction or the fixing of the transcontinental rates of the railroads, excepting long haul—short haul applications (964). With these exceptions, railroads themselves and the competitive influences have determined westbound rates to the terminal points. Up to the time the Atchison got into San Francisco, in northern California the Southern Pacific being either the delivering line or the originating line, no rates could be made without their concurrence—no through rates, joint rates. They were practically masters of the situation as to freight rates on all the rates which were known as joint rates, less than the combination of the local rates. (Chambers, 964.) The presence

of one or more railroads or of more than one railroad, capable of performing a given service, does have the effect of lowering the rates over a long period of time. It may have that effect to a considerable extent. (Chambers, 965.) Service is very much influenced by competition. If you have four railroads in position to do the same business, the chances are that you will get better service over them than if you have two. (Chambers, 965.)

In their efforts in behalf of the Sunset the Southern Pacific have put forth every effort they possibly could, in connection with the transaction of business, to influence patrons to their route and to hold them as clients. There are a thousand and one ways, so to speak, in which a common carrier can have influence with a patron. The local situation has a large bearing as to where the freight originates, the ability of the carrier to serve the patron on other than the traffic specifically involved and in question, the disposition to accommodate, and a lot of little things of that kind, all going to have influence with the shipper; and when pressed by the carrier, the shipper naturally desires to cooperate as far as he can consistently, without jeopardizing his own interests; and in the case of the Sunset the reforms instituted in the way of prompt settlements of claims, expedited service, special attention to special traffic, all tended to strengthen that route at the expense of all of the all-rail carriers overland. (Munroe, 376.) The Union Pacific was in advance of the Central Pacific until 1901. (Munroe, 379.) If the control of the Southern

over the Central was dissolved, there would be a marked increase in competition in everything that the word implies. Competition naturally tends toward helping the shippers, and that undoubtedly would be the case as much in the future as it has been in the past. (Munroe, 380.)

Competition as a practical matter does furnish an inducement for the maintenance of good service and the improvement of service on the part of the competitors, and competition has played a great part in the development and improvement of the service furnished by the railroads to the shippers everywhere, and will in all probability continue to do so. (Spence, 1173.)

The impairment of the service on the Central Pacific would help to give business to the Sunset Route. (Chambers, 950.)

A solicitor who makes it a point to trace freight cars and keeps his patrons advised of their whereabouts in transit and final delivery is considered very useful and beneficial to the shipper. If the Central Pacific was released from the control of the Southern Pacific, the Central Pacific would immediately then become an independent line, officered with president, vice president, general manager, freight traffic manager, auditor, purchasing department, and on down in the lesser capacities to freight solicitors, all of whom would have a reputation to maintain and a record to make. Their entire influence and efforts would be exerted constantly in behalf of the Central Pacific road. The industrial and commercial

interests served by that line would receive one hundred per cent of their efforts and all of the important cities and towns and territories served by the road would benefit to the same extent. This separation would improve the conditions to the shipper. Competition is the foremost factor in stimulating service, and were it not for competition the service would be down to a minimum. Competition most certainly has an effect upon both rates and classifications, and always will have. It would have a very decided influence over the making of rates. (Connor, 347.)

The through rates of fare for business between California and points in the Eastern States were regulated by competition. (Stubbs, 97; Kruttschnitt, 741.)

Up to the completion of the Santa Fe to southern California the rates were large and the railroads had no difficulty in getting whatever they thought was fair. They could charge whatever they thought best. When the other road was completed, however, business was divided and the rates cut down (Stanford, 99.)

The threatened competition of the Southern Pacific Company reduced the California-to-Europe grain rates to one-third in a short time. (Hopkins, 670.) The Southern Pacific Company did not keep that competition up very long. It was not necessary. It was a conspicuous example of the quick effect, in the reduction of a rate, of the presence of competition (686).

If the Central Pacific Railroad were separated and working with the Union Pacific Railroad, they would become active competitors of the Sunset, as a practical matter. That would be true of every one of the California terminals that that road reached, and any other terminals with which they could make suitable traffic arrangements, with the existing roads, including the Southern Pacific. If the Central Pacific were separate, it would compete at Sacramento, Marysville, Stockton, Oakland, and San Jose, and would doubtless have some arrangement for reaching San Francisco; and this competition would be as acute as any other competition. The tendency of a number of railroads competing is to reach out to the shipper and reach conclusions with him which do result in reductions of rates. (Sproule, 250.) Generally speaking, competition is to the public advantage . (Sproule, 253.) The release of the Central from the control of the Southern would be an advantage to the public to the extent that competition may be an advantage to the public. (Sproule, 254.)

If you have two roads which have a voice in the rate question you stand 100 per cent, or double, the chance of gaining tariff concessions that you do if there is only one road; if there are three roads, you stand three times the chance of getting your concessions; or if four, four times; and so on. (Wheeler, 897.) And, accordingly, the San Francisco Chamber of Commerce approved the general features of the agreement for the sale of the Central Pacific Railroad by the Southern Pacific Company (Wheeler, 897), and

in that connection their traffic manager stated that there might be some advantage in the separation of the Central and the Southern, if it is a genuine separation, so that they would have four roads instead of three. (Wheeler, 898.)

Any incidental benefits from the combination really rest on the theory that a Government-controlled monopoly is better than competition between railroads (Kruttschnitt, 771; Eshleman, 891), and that is a matter not of the law as it is, but a matter of legislative policy, on which Congress has declared against the creation of monopoly and in favor of normal competition. (Eshleman, 891.)

The attitude of the Californaia Railroad Commission is summed up by Mr. Eshleman in these words:

> If you desire an expression of opinion—and it may explain my attitude on this—my entire position and the position of the commission was assumed mainly on the theory that a regulated or Government-owned monopoly was better than any condition that could be brought about by competition in the case of railroads.
>
> My belief is that regulation by Government authority is an alternative to regulation by competition, and is only justified on the ground that competition does not do its duty. It ought to be a matter of legislative policy * * * But, as you say, that goes to the policy and not what the law demands (891).

Congress differs from the California Railroad Commission on this economic question. The petition

seeks the application of the law as it is, in the belief that the public interest is better served thereby in the long run.

5. *The benefits derived from such a restraint do not exempt it from the provisions of the antitrust act.*

A restraint of commerce is not rendered lawful by the fact that its effect is good in the particular case or that it was undertaken with good intent.

Restraint of trade by the unreasonable suppression of competition and not the result of that suppression is the crime which the Sherman Antitrust Act prohibits.

It is clearly established that, if the effect of a combination is to restrain trade or to monopolize it, the purpose for which it was formed does not save it.

Standard San. Mfg. Co. v. *U. S.*, 226 U. S. 20, 49.

Internat'l Harvester Co. v. *Mo.*, 234 U. S. 199, 207.

Eastern States Retail Lumber Dealers Assn. v. *U. S.*, 234 U. S. 600, 613.

Thomsen v. *Cayser*, 243 U. S. 66–87.

U. S. v. *Reading Co.*, 226 U. S. 324, 353.

Northern Securities Co. v. *U. S.*, 193 U. S. 197, 332, 352.

Addyston Pipe & Steel Co. v. *U. S.*, 175 U. S. 211, 234, 243.

U. S. v. *Joint Traffic Assn.*, 171 U. S. 505, 562.

It is more important to preserve free, fair competition than to secure benefits by methods which tend

to defeat competition. This is a public policy which Congress has determined by statute.

Thomsen v. *Cayser*, 243 U. S. 66, 86.

Eastern States Retail Lumber Dealers Assn. v. *U. S.*, 234 U. S. 600, 613.

Addyston Pipe & Steel Co. v. *U. S.*, 175 U. S. 211, 242.

Pearsall v. *Great Northern Ry.*, 161 U. S. 646, 676.

Internat'l Harvester Co. v. *Missouri*, 234 U. S. 199, 207.

United States v. *Reading Co.*, 226 U. S. 324, 353.

Northern Securities Co. v. *U. S.*, 193 U. S. 197, 332, 352.

In 1890, when the Sherman Antitrust Act was passed, the growing combinations then publicly discussed were feared because of the control which they could exercise. It was to prevent this control that the act was passed.

At that time at least three policies were open for adoption—(1) letting things take their own course; (2) permitting the organization of controlling units and subjecting those units to governmental regulation by commission or otherwise; and (3) adopting a law giving a preventive and punitive remedy against the creation of such controlling organizations, or of organizations tending in that direction, and so helping to maintain the competitive principle as the safest and best. This third course was followed.

The debates in Congress show that what was feared in monopoly and restraint of trade was the inherent power for injury.

21 Congressional Rec. 2457, 2726.

United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 319.

Standard Oil Co. v. *United States*, 221 U. S. 1, 50.

The crime defined by the act is not raising prices, or putting men out of business, or preventing their entering business, or engaging in unfair practices. It is restraining or monopolizing trade, or attempting to do so.

It is enough if the power is obtained, even if it is not exercised.

United States v. *Reading Co.*, 253 U. S. 26.

Thomsen v. *Cayser*, 243 U. S. 66, 86.

Eastern States Retail Lumber Dealers' Assn. v. *U. S.*, 234 U. S. 600, 613.

Internat'l Harvester Co. v. *Missouri*, 234 U. S. 199, 209, 210.

United States v. *Reading Co.*, 226 U. S. 324, 353.

Standard San. Mfg. Co. v. *United States*, 226 U. S. 20, 49.

United States v. *Union Pac. R. R. Co.*, 226 U. S. 61, 88.

United States v. *American Tobacco Co.*, 221 U. S. 106.

Standard Oil Co. v. *United States*, 221 U. S. 1.

Nat'l Cotton Oil Co. v. *Texas*, 197 U. S. 115, 129.

Northern Securities Co. v. *United States*, 193 U. S. 197, 331, 337.

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211, 234, 243.

Cassall v. *Great Northern Ry.*, 161 U. S. 646, 676.

United States v. *Assoc. Bill Posters*, 235 Fed. (D. C. Ill.) 540.

United States v. *Quaker Oats Co.*, 232 Fed. (D. C. Ill.) 499, 502.

United States v. *American Can Co.*, 230 Fed. (D. C. Md.) 859, 901.

United States v. *Reading Co.*, 226 Fed. (D. C. Pa.) 229, 271.

United States v. *Internat'l Harvester Co.*, 214 Fed. (D. C. Minn.) 987, 999.

United States v. *Whiting Co.*, 212 Fed. (D. C. Mass.) 466, 477.

United States v. *Great Lakes Towing Co.*, 208 Fed. (D. C. Oh.) 733, 744.

O'Halloran v. *American Sea Green Slate Co.*, 207 Fed. (D. C. N. Y.) 187, 190.

United States v. *Lake Shore & Mich. So. Ry. Co.*, 203 Fed. (D. C. Oh.) 295, 312.

United States v. *Standard Oil Co.*, 173 Fed. (C. C. Mo.) 177, 187.

United States v. *American Tobacco Co.*, 164 Fed. (C. C. N. Y.) 700, 702.

United States v. *Northern Securities Co.*, 120 Fed. (C. C. Minn.) 721, 730.

Chesapeake & Ohio Fuel Co. v. *United States*, 115 Fed. (C. C. A. 6th) 610, 623.

United States v. *Chesapeake & Ohio Fuel Co.*, 105 Fed. (C. C. Oh.) 93, 103.

In most of these many cases, there was not a complete monopoly, nor any unfair methods of business, nor any increase of prices to the public, nor any driving out of competition, nor any other injurious use of the power or control which the combination had obtained.

Congress did not direct its prohibition against the *bad results* of combinations in unreasonable restraint of competition or against those combinations only which were formed with evil intent. It forbade the *combinations themselves*, and all of them. There was no exception made for those combinations in restraint of trade which worked a public good or for those undertaken with laudable intent. Congress considered the results which usually and ultimately follow such combinations and prohibited the creation of the despotic influence, however benevolent its exercise.

In *United States* v. *Union Pacific Railroad Company*, 226 U. S. 61, 88, the court says:

> Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.

> Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. (83.)

In *United States* v. *Reading Co.*, 253 U. S. 26, 57, the court says:

> This dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management but by deliberate, calculated purchase for control.
>
> That such a power, so obtained, *regardless of the use made of it*, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the antitrust act has been frequently held by this court. (Italics not in original.)

In *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 209, 210, the court says:

> It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 62; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it.
>
> This is one of the results which the statute was intended to prevent, the unequal struggle of individual effort against the power of combination.

This restates a principle repeatedly recognized.

United States v. *Reading Co.*, 226 U. S. 324, 353.

Northern Securities Co. v. *United States*, 193 U. S. 197, 332, 352.

United States v. *Joint Traffic Association*, 171 U. S. 505, 562.

In *Thomsen* v. *Cayser*, 243 U. S. 66, 87, the court says:

> The resultant good of the plan, it is said, was "regularity of service, with steadiness of rates"; and that "the whole purpose of the plan under which the defendants acted was to achieve this result."
>
> We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade others might have done so and been willing to serve shippers without constraining them, been willing to compete against others for the patronage of the trade.

In *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 613, the court says:

> The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the

national authority thus exerted. *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 242.

> It (the Sherman Act) broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce. It is true that this court held in the *Standard Oil* and *Tobacco Cases*, *supra*, and in the subsequent cases following them, that in its proper construction the act was not intended to reach normal and usual contracts incident to lawful purposes and intended to further legitimate trade. (609.)

In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 234, 243, the court says:

> It is useless for the defendants to say they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement.
>
> If the necessary, direct, and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and, that regulation existing, it is unimportant that it was not designed.

This is followed in *United States* v. *Standard Oil Co.*, 173 Fed. 177, 179 (C. C. E. D. Mo.).

In *Northern Securities Co.* v. *United States*, 193 U. S. 197, 331, the court says:

> Congress, * * * by the antitrust act, has prescribed the rule of free competition among those engaged in such commerce.

In *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 129, the court says:

> According to them (statutes against combinations), competition, not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest and the power such unification gives.

In *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20, 49, the court says:

> Nor can they (the prohibitions of the act) be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.

In *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 676, the court says:

> Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public is beside the question. Whether it has that effect or

not, it certainly puts it in the power of the consolidated corporation to give it that effect—in short, puts the public at the mercy of the corporation. There is and has been for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We can not say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language. While, in particular cases, two railways, by consolidating their interests under a single management, may have been able to so far reduce the expenses of administration as to give their customers the benefit of a lower tariff, the logical effect of all monopolies is an increase of price of the thing produced, whether it be merchandise or transportation. Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolists of all traffic along their lines; but the general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels against the attempt of one road to control all traffic between terminal points, also connected by a competing line.

In *United States* v. *Northern Securities Co.*, 120 Fed. 721, 730 (C. C. D. Minn.), the court says:

> It may be that such a virtual consolidation of parallel and competing lines of railroad as has been effected, taking a broad view of the situation, is beneficial to the public rather than harmful.
>
> It may be that the combination was the initial and a necessary step in the accomplishment of great designs, which if carried out as they were conceived, would prove to be of inestimable value to the communities which these roads serve and to the country at large.
>
> We shall neither affirm nor deny either of these propositions, because they present issues which we are not called upon to determine, and some of them are issues which no court is empowered to hear or decide, involving, as they do, questions of public policy which Congress must determine.

In *United States* v. *Chesapeake and Ohio Fuel Co.*, 105 Fed. 93, 103 (C. C. S. D. Ohio), the court says:

> It (the policy of the law) is opposed to the methods of combination, and will not suffer competition to be destroyed under the pretense that the public will be better served by combination.
>
> The important question is not whether the performance of the contract so far has resulted in actual injury to trade, but whether the contract confers power to regulate and restrain trade, upon those charged with its performance.

In *United States* v. *American Tobacco Co.*, 164 Fed. 700, 702 (C. C. S. D. N. Y.), the court says:

> What benefits may have come from this combination, or from the others complained of, it is not material to inquire, nor need subsequent business methods be considered, nor the effects on production or prices. The record in this case does not indicate that there has been any increase in the price of tobacco products to the consumer. There is an absence of persuasive evidence that by unfair competition or improper practices independent dealers have been dragooned into giving up their individual enterprises and selling out to the principal defendant.

In *United States* v. *Standard Oil Co.*, 173 Fed. 177, 187 (C. C. E. D. Mo.), the court says:

> It was the granting of the power to prevent competition to the holding company, not the subsequent exercise of that power, that in the opinion of the Supreme Court brought the combination (the Northern Securities Co.) under the ban of the law.

In *United States* v. *Lake Shore & M. S. Ry. Co.*, 203 Fed. 295, 312 (D. C. S. D. Ohio) the court says:

> Stress is laid both in the evidence and argument upon the economy of this interchange of facilities, since it secures easier grades over the Hocking Valley, as compared with those of the Toledo & Ohio Central, and avoids the necessity of building double tracks and of operating opposing trains over single-track roads with the usual sidings. These advantages may be

conceded from an operating point of view; yet the logic of it all would in the end destroy competition between parallel roads generally.

In *O'Halloran* v. *American Sea Green Slate Co.*, 207 Fed. 187, 190, 191 (D. C. N. D. N. Y.), the court says:

> The legality or illegality of a combination is not to be determined by weighing or balancing the benefits to the combining parties as against the injury to the public or public interests, or by weighing and balancing the possible benefits to the public interests as against the injury to such interests.
>
> To so construe this act would make injurious effects on the general public, and not interference with and restrictions or restraints upon interstate commerce, the essence of the offending.
>
> The power under and pursuant to the combination to do the prohibited things is what brands it (the combination) as illegal, not the actual exercise of that power.

In *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 744 (D. C. N. D. Ohio), the court says:

> The fact that the towing and wrecking service has been improved under the towing company's administration can not legalize the combination if otherwise unlawful. Not only do good motives furnish no defense to a violation of the antitrust act, but we have no right to assume that the unsatisfactory conditions existing in 1899 could not have been eliminated by lawful and normal methods.

> Whatever may be the views of individual economists, under the Federal statutory policy normal and healthy competition is the law of trade; and such evils as may result from such competition must be considered less than those liable to follow a complete unification of interests and the power such unification gives. The evil of unification lies in the temptation to higher rates and lessened regard for the public interests; and the tendency to this evil result must be recognized even though not in a given case yet realized in actual experience.

In *United States* v. *Whiting*, 212 Fed. 466, 477 (D. C. Mass.), the court says:

> The fact that the alleged agreement does not appear to have been used oppressively is not sufficient to save it. In cases of restraint of trade or monopoly not arising under the Sherman Act, the prevailing view (although there has been some difference of opinion on this point) is that the potential evils of a monopoly or dominating control in any trade are sufficient to invalidate agreements having that purpose or result without proof of actual injury or evil result. *People* v. *Sheldon*, 139 N. Y. 251, 34 N. E. 785.

In *United States* v. *Associated Billposters*, 235 Fed. 540 (D. C. Ill.), the court in holding that it was unlawful for an association to attempt to control the national billboard advertising in the cities and towns in which the members of the association were

located, said that the association was not saved from unlawfulness by the evidence presented of general improvement in and development of the billboard business during the existence of the organization, and that "even perfection in any line of business is not to be thus procured."

In *United States* v. *Quaker Oats Co.*, 232 Fed. (D. C. Ill.) 499, 502, Judge Mack says:

> A potential monopoly that has failed to exercise its tremendous power and has become and has been a very good trust, is none the less subject to the law.

In *United States* v. *American Can Co.*, 230 Fed. (D. C. Md.) 859, 901, the court says:

> One of the designs of the framers of the antitrust act was to prevent the concentration in a few hands of control over great industries. They preferred a social and industrial state in which there should be many independent producers.
>
> The law wishes that industrial and trading corporations shall operate under the checks and balances imposed by free and unrestrained competition.

6. *The public is injured by this restraint to as great an extent at least as by the other restraints of trade by combination of common carriers which have been held unlawful.*

It is safe to say that in every litigated case which has been presented to the courts to dissolve a restraint of trade consisting of the acquisition by one

railroad of the control over a competing railroad, evidence has been introduced to show the real advantages to the public which have resulted from the restraint and will result from permitting it to continue. There almost always are some such advantages. They have been commented on in a number of the cases cited in the preceding subsection.

In the *Northern Securities case* the court either was convinced of the great advantages to the public that were to be expected from the combination or took them for granted. (*Supra*, p. 102.)

In the *Union Pacific case* there was no evidence of any injury to the public beyond the one inherent in a restraint of trade. On the other hand, there was a mass of convincing evidence of the great improvements in the condition of the railroads and in the service to the public which had followed the restraint. (*Supra*, p. 96.)

In the *Lake Shore case* the evidence showed the economies and increased facilities that would result to the public from the restraint because of the interchangeable use of two lines of railroad by the one combination. (*Supra*, p. 103.)

In the *Great Lakes Towing case* the evidence showed the benefits to the public which had resulted from coordination of service by the combination.

It is asserted that the combination between the Central Pacific Railroad and the Southern Pacific Railroad reduces expenses, and that this enables

the railroads to give the public the benefit of a lower tariff.

The evidence in this case, taken at its best for the defendants, shows nothing more than in the other cases of restraint of trade of which the foregoing are specimens. When one combination acquires two railroads it always furnishes opportunity for the interchangeable use of tracks and the single ownership and operation of terminals at common points, and single line transportation from points on one road to points on the other, and the use of through trains for local service. In none of these respects is there anything peculiar to this case.

The witnesses for the defendant who say that the combination between the Central Pacific Railroad and the Southern Pacific Railroad is beneficial and not injurious, say the same concerning the combination between the Union Pacific Railroad and the Southern Pacific (Kruttschnitt, 820, 773; Chambers, 987; Sproule 239.)

In the *Union Pacific case*, there was a most impressive reason for permitting the combination, but for its offense against the law and the policy of preserving normal competition. The Union Pacific Railroad needed a direct line to San Francisco. The great weight of its business was to and from California. To secure such a line was a natural development. It was quite as natural as any common operation or common use of facilities by the Central Pacific and the Southern Pacific. It was not, however, an advantage to secure which the Union Pacific

Railroad Company should be permitted to restrain trade.

The same is true of such advantages as might come from the restraint of trade in this case.

The defendants carry their theories to their logical conclusion. Mr. Kruttschnitt says:

> If the Atchison and the Southern Pacific were under common management, I am convinced that in California alone hundreds of thousands of dollars in operating expenses would be saved by combining forces at all those junction points.
>
> I would carry that theory to its logical conclusion, if applied to all the railroads of the country, and say that if they were all combined under one control it would result in an enormous saving, in the elimination of duplications—an incalculably large saving, assuming that the management were able and efficient.

The present case is not peculiar. These advantages, such as they are in practice, existed in all the railroad combinations which have been held unlawful, despite them.

FOURTH.

THE COMBINATION ALSO PRODUCED A MONOPOLY.

The character of this combination as a monopoly is to be tested by the conditions which existed when it was formed pursuant to the plan of February 20, 1899.

A combination which brings into one corporate control the only two existing competitive agencies

in commerce of a particular kind monopolizes that commerce.

U. S. v. *Union Pacific Railroad Co.*, 226 U. S. 61.
U. S. v. *Terminal Association*, 224 U. S. 383.
Standard Oil Co. v. *U. S.*, 221 U. S. 1.
U. S. v. *American Tobacco Co.*, 221 U. S. 106, 179.
Northern Securities Co. v. *U. S.*, 193 U. S. 197, 325.

When this combination was formed it put into the single ownership of the Southern Pacific Company the stock in all the railroad corporations having railroad entrance from any part of the United States into California north of Mojave and Tehachapi Mountains.

This monopoly continues, except so far as modified by the extension of the Santa Fe Railroad, which opened to San Francisco Bay, July 1, 1899, and the Western Pacific Railroad, which opened to San Francisco Bay, July 20, 1910.

For traffic purposes the State of California divides itself to some extent at the Tehachapi Mountains near Mojave in the southern part of the State. What is described as the southern part of California is to the south of this point, and what is described as central and northern California, is to the north of this point.

On February 20, 1899, there were no railroads in California for the movement of interstate business except the Central Pacific Railroad, the Southern Pacific Railroad, and the Atchison, Topeka & Santa Fe Railroad.

The Atchison, Topeka & Santa Fe Railroad did not extend north of Mojave. It reached Mojave in 1885, and some of the principal points in the southern part of California soon thereafter. The Atchison, Topeka & Santa Fe Railroad Company had a working agreement with the Southern Pacific Company, which is not in evidence, and which gave the Atchison, Topeka & Santa Fe Railroad Company some rights to operate its rolling stock over the railroads controlled by the Southern Pacific Company, and also provided for joint through rates on transcontinental freight. By this agreement the division of the rate was 77 per cent to the Atchison, Topeka & Santa Fe for hauling from the Missouri River to Mojave or in the opposite direction, and 23 per cent to the Southern Pacific Company for hauling from Mojave to other California points, or in the opposite direction. (Spence, 1167.)

The right of the Santa Fe Company to operate its rolling stock over the rails of the Southern Pacific Company was not exercised. (Chambers, 955.)

In 1898 the Atchison, Topeka & Santa Fe Railway Company acquired the San Francisco & San Joaquin Valley Railway Company extending from San Francisco to a point near Bakersfield, about 70 miles north of Mojave. (Kruttschnitt, 800; Chambers, 954.) Steps were taken immediately to build a new line to connect the end of this railroad with the Santa Fe rails at Mojave. Thereupon an agree-

ment was made between the Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Company, under which the Santa Fe Company acquired the right to operate its trains from Mojave to a point near Bakersfield over the existing tracks of the Southern Pacific Company. (Chambers, 975.) This gave the Santa Fe a through line from Chicago to San Francisco, which was opened July 1, 1899. (Chambers, 954.)

Prior to this date the influence of the Santa Fe north of Mojave was comparatively slight.

Mr. Chambers, vice president of the Santa Fe, testified that the Santa Fe did not get any great bulk of the freight from the territory north of Techachapi; that there never was much; that they had a large volume of business from points on Southern Pacific rails, due chiefly to the efforts which they made with the consignees in the East (956,958); that, in the nature of things, the terminal lines, either initial or final, are in a much better position to compete than any intermediate carrier; that they did not reach to the business to any extent in northern California, and competition was just for the southern California business (959); that up to July 1, 1899, the Southern Pacific and the Central Pacific together held substantially an absolute monopoly of the California transcontinental rails north of Mojave. (Chambers, 954.)

Mr. Kruttschnitt, the chairman of the executive committee of the board of directors of the Southern Pacific Company, testified that up to the time of

the entrance of the Santa Fe into San Francisco the Central and Southern together continued to have a monopoly of the rail entrance into California north of Mojave. (Kruttschnitt, 764, 768.)

Mr. Spence, director of traffic of the Southern Pacific Company, testified that the Santa Fe was a factor in the competition before 1899 (Spence, 1029), because the Southern Pacific had to make as low rates to San Francisco as the Santa Fe did to Los Angeles in order to keep the people satisfied; that the Santa Fe was an active and successful competitor north of Mojave (Spence, 1030); that the possession of the initial or terminal lines, if they have been in the territory for a number of years, is of substantial advantage in competition. (Spence, 1158.)

Mr. Munroe, vice president of the Union Pacific Railroad, testified that the Santa Fe, prior to getting into San Francisco, had exerted a very limited influence only on the freight north of the Techahapi Pass (373), and that it took this railroad a little while after it reached San Francisco before it got a strong foothold (373).

Mr. Connor, commercial agent or general agent of the Southern Pacific Company in Cincinnati from 1889 to 1913, and now of the Union Pacific Railroad, testified that when the Santa Fe first got into San Francisco it was without terminals or branches and had no standing in California to speak of, and was not in a position to control or

influence more than a very small percentage of the business (362).

Mr. Eshleman, formerly of the California Railroad Commission, testified that the company in possession of the terminals always had the advantage (892); that he did not think that the Santa Fe (888) was allowed to get much business originating on Southern Pacific rails; and that the Santa Fe has never had many branches in California. (Kruttschnitt, 768, 817.)

The Central Pacific Railroad had an absolute monopoly of the California transcontinental railroad traffic until 1881. The Southern Pacific Railroad, building southerly and southeasterly from San Francisco, made a junction with the Atchison, Topeka & Santa Fe Railroad at Deming, N. Mex., in March, 1881, and with the Texas & Pacific Railroad at Sierra Blanca, Tex., on January 1, 1882; but the substantial monopoly of the Central Pacific Railroad was not broken until the opening of the Southern Pacific Railroad to New Orleans on February 1, 1883. (Schumacher, 145; Sproule, 224, 225; Kruttschnitt, 760, 763.)

The Northern Pacific Railroad was opened to Portland, Oreg., in 1883; the Canadian Pacific Railroad to Vancouver in 1887; and the Great Northern Railroad to Seattle in 1893; but none of these railroads ever have had any substantial effect upon California transcontinental freight. (Sproule, 227; Connor, 341; Chambers, 959.)

The Missouri Pacific Railroad from St. Louis, connecting with the Denver & Rio Grande Railroad and the Rio Grande Western Railroad, reached Ogden, Utah, in 1883 (Sproule, 224), but had no entrance into California except over the Central Pacific Railroad until the construction of the Western Pacific Railway in 1910.

The Oregon Short Line and Oregon Railway & Navigation Company connected the Union Pacific Railway at Granger, Utah, with Portland, Oreg., in 1884. It had no connection with California except by water from Portland to San Francisco. It did not reach interior California. The Supreme Court decided in *United States* v. *Union Pacific Railroad Company*, 226 U. S. 61, that this route was a factor in rate making to San Francisco. Mr Sproule, president of the Southern Pacific Company, testified that it was potential but not powerful (233); that it would not be a matter of effective competition, but a matter of stratagem (235). Mr. Kruttschnitt testified that there was a rate war with the Portland steamers in 1895 (765); that he did not know much about the movement of transcontinental freight over this line beyond what the Supreme Court said in the Union Pacific opinion (765); that before this opinion they thought the competition over this line had been largely a theoretical one, but that they had accepted the court's view (768). Mr. Kruttschnitt did not state whether the rate war to which he referred was on transcontinental business or on business between Oregon and California. Mr. Spence testified

that this line does not carry any substantial freight traffic; that it could fix the terms for the other route; that all he meant was that the Portland route was a rate-making factor; that it was a reserve that put the Union Pacific in a position to see that the direct route did not seriously overreach it in the matter of terms (Spence, 1159). Mr. Chambers testified that it is likely that some freight moved that way, but not any great volume, and that it was not a serious competitor with the lines running directly to California. Mr. Schumacher, chairman of the directors of the Chicago, Rock Island & Pacific Railway Company, and former representative of the Union Pacific Railroad at San Francisco, testified that he never thought it a practicable route (160), and that he never called it a line at all (171). Mr. Connor testified that he never knew of a pound of freight going to San Francisco that way (341).

The Chicago, Rock Island & Pacific Railroad from Chicago joins the El Paso & Southwestern Railroad, which reached the Southern Pacific Railroad at El Paso, Tex., in 1902. (Sproule, 225.) It has no independent means of access to California.

The San Pedro, Los Angeles & Salt Lake Railroad, connecting the Union Pacific Railroad at Salt Lake City with Los Angeles and San Pedro, was opened on May 1, 1905. (Sproule, 225.) This is a practicable route for some points in the southern part of California, but not for any in the central or northern part. (Chambers, 960; Spence, 1159.)

The Western Pacific Railway has never succeeded in controlling a large amount of the transcontinental traffic of California. (Kruttschnitt, 818; Chambers, 960.)

There are many railroads in the western and central part of the United States that do a California business, but they are dependent upon the railroads above described to reach any part of California, Nevada, or southwestern Oregon.

In 1899 the only steamship line to California with connections across the Isthmus of Panama was that of the Pacific Mail Steamship Company. (Spence, 1150.) The control of this was at this time in the hands of Mr. Huntington, the president of the Southern Pacific Company. (Schwerin, 694.)

The American-Hawaiian Steamship Company began to operate vessels between New York and San Francisco via the Straits of Magellan in October, 1900. In 1907 this line was changed so that it operated by a rail connection over the Isthmus of Tehuantepec. (Spence, 1021.)

Since the opening of the Panama Canal several additional steamship lines have been put into operation between New York and San Francisco (D. Ex. 57, p. 2242). (Schwerin, 698.)

All of the steamship lines are dependent for deliveries in the interior of California upon the railroads already mentioned. (Spence, 1127.)

Within the last five years several electric lines have been opened in California, and these operate

under joint through rates with the Atchison, Topeka & Santa Fe Railroad.

The Southern Pacific Company still has a good deal of exclusive territory in the State of California (Eshleman, 881.)

Most of the more important California terminals are reached both by the Southern Pacific Railroad and by the Central Pacific Railroad. (Spence, 1167.) A number of these are reached also by the Santa Fe in connection with the electric lines. There are few, if any, important points reached by the Santa Fe which are not on the Central Pacific Railroad or on the Southern Pacific Railroad. (Spence, 1168.)

The changes stated, which have occurred since 1899, have reduced somewhat the area in which the Central Pacific Railroad and the Southern Pacific Railroad have a monopoly, but that monopoly still continues to an important extent. The Southern Pacific Company still has a good deal of exclusive territory in California. (Eshleman, 881.) In February, 1899, the monopoly covered the entire developed part of the State north of Mojave. A combination of the two railroads into the single ownership of the Southern Pacific Company perfected in one control the monopoly of these two railroads.

It is suggested for the defendants that this was the monopoly of a pioneer. It was not. Two competing pioneers combined to make this monopoly.

SECOND ASSIGNMENT.

The Pacific Railroad laws imposed on the franchise of the Central Pacific Railroad and on the franchise of the Union Pacific Railroad the reciprocal duty of the one railroad not to discriminate against the other in favor of any other railroad, but to exert together in normal voluntary cooperation all the natural forces of a single railroad naturally competing with the parallel Southern Pacific Railroad, and the systematic and preconcerted discrimination which the Southern Pacific Company in operating the franchise of the Central Pacific Railroad has practiced against the Union Pacific Railroad in favor of the Southern Pacific Railroad is a violation of those laws; and this combination between the Southern Pacific Railroad and the Central Pacific Railroad furnishing the incentive of self-interest to discriminate against the Central Pacific Railroad and the Union Pacific Railroad in favor of the Southern Pacific Railroad, and so to violate those laws, imposed on the Central Pacific Railroad an unreasonable and unlawful restraint to the injury of the public and to the defeat of the purpose of those laws, which was to create and develop three separate, competitive systems of railroad to the Pacific coast, with all the advantages that would come to the public from three railroads which were competitive.

(1) The Central Pacific Railroad Company was under a duty not to discriminate against the Union Pacific Railroad Company. (2) The combination into the Southern Pacific Company which created the lively incentive to discriminate against the Union

Pacific Railroad was in itself violative of that duty even if no actual discrimination occurred. (3) There has been long continued discrimination against the Union Pacific Railroad as a result of the combination.

FIRST.

THE CENTRAL PACIFIC RAILROAD WAS UNDER A DUTY NOT TO DISCRIMINATE AGAINST THE UNION PACIFIC RAILROAD.

The Central Pacific Railroad Company was under a special duty not to discriminate against the Union Pacific Railroad. This was a duty peculiar to the railroads subsidized under the Pacific Railroad laws. It was something additional to the ordinary duty of a common carrier not to discriminate.

The duty not to discriminate was not performed merely by permitting tracks to join, through trains to run, and joint rates and through service to continue. It required the Central Pacific Railroad Company to abstain from any discriminative action injurious to the Union Pacific Railroad.

This is evident from the language of the Pacific Railroad laws read in the light of the circumstances existing at the time of their enactment, and it has been expressly declared by this court in *U. S.* v. *Union Pacific Railroad Company*, 226 U. S. 61.

On May 5, 1852, the California Legislature passed an act to grant to the United States a right of way through California for the construction of a railroad from the Atlantic to the Pacific Ocean (chap. 77, p. 150).

On July 1, 1862, Congress granted the fundamental franchise under which the Central Pacific Railroad was built. This act (P. Ex. 2, p. 1223) was entitled, "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes." (12 Stat., c. 120, p. 489.)

This act incorporated the Union Pacific Railroad to construct a railroad near the forty-first parallel of latitude west and east from the one-hundredth meridian of longitude, which is near the center of Nebraska, to the western boundary of Nevada (P. Ex. 2, p. 1229), and to the Missouri River (P. Ex. 2, pp. 1231–1233). It authorized the Union Pacific Railroad Company to connect at the Nevada line with the railroad to be built by the Central Pacific Railroad Company of California (P. Ex. 2, pp. 1229, 1230). It authorized the Central Pacific Railroad Company of California to construct a railroad from the Pacific coast near San Francisco, or from the navigable waters of the Sacramento River to the eastern boundary of California, and thereafter to join in the completion of the railroad to the Missouri River (P. Ex. 2, p. 1231). It granted to these railroads a subsidy of public lands and also bonds of the United States to the amount of $16,000 for each mile of ordinary railroad, and double and treble that amount for certain sections (P. Ex. 2, p. 1232), these bonds to be paid at

maturity by the railroads. It required in part return that—

> The whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one connected, continuous line.

October 7, 1862, the Central Pacific Railroad Company of California accepted this act (P. Ex. 59, p. 1655) and on June 23, 1863, the Union Pacific Railroad Company accepted it (P. Ex. 60, p. 1658).

On July 2, 1864 (13 Stat., c. 216, p. 356), Congress amended the act of July 1, 1862, in several particulars (P. Ex. 3, p. 1236). This amendment doubled the land subsidy and permitted the railroads to issue first-mortgage bonds to an amount equal to the bonds to be furnished by the Government (P. Ex. 3, p. 1242). It provided that—

> The several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others. (P. Ex. 3, p. 1244.)

On March 3, 1865, 13 Stat., c. 88, p. 504, Congress passed an act (P. Ex. 4, p. 1250) ratifying the assignment which the Central Pacific Railroad Company of California had made to the Western Pacific Railroad Company of its right to construct a portion of the railroad west of Sacramento to San Jose.

On April 10, 1869, the Senate and House of Representatives passed a joint resolution (P. Ex. 8, pp. 1263, 1264) providing, among other things, that—

> The common terminus of the Union Pacific and the Central Pacific Railroads shall be at or near Ogden; and the Union Pacific Railroad Company shall build and the Central Pacific Railroad Company pay for and own the railroad from the terminus aforesaid to Promontory Summit, at which point the rails shall meet and connect and form one continuous line.

On June 20, 1874, (18 Stat., c. 331, p. 111), Congress passed an act (P. Ex. 10, p. 1274) adding by amendment to the act of 1864 a clause as follows:

> Any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of

said roads equal advantages and facilities as to rates, time, or transportation, without any discrimination of any kind in favor of, or adverse to, the road or business of any or either of said companies, shall be deemed guilty of a misdemeanor, etc.

In *United States* v. *Union Pacific Railroad Company* (226 U. S. 61, 91) the court says:

> These acts required the two roads, the Central Pacific and Union Pacific, to be "operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one connected, continuous line" (12 Stat. 489, 495, act of July 1, 1862, c. 120, sec. 12) and in such operation and use, "to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others * * *." (13 Stat. 356, 362, act of July 2, 1864, c. 216, sec. 15.) They also authorized the consolidation of the roads. These acts, it is said, are only intended to secure the permanent physical connection of the roads and to provide for equal accommodations upon the basis of independent carriage and outline no method by which the two roads can be compelled to make a joint through rate, and that at the time of the stock transfer there was no such provision in the interstate commerce acts. Therefore, it

is said that the Union Pacific, no less than the Rio Grande, would have been practically at the mercy of the Southern Pacific in the favorable or unfavorable treatment which might have been accorded to it in the matter of through business to be transported eastwardly. The purpose of Congress to secure one permanent road to the coast so far as physical continuity is concerned, is apparent, but we do not think the acts stop with that requirement. It is provided that facilities as to rates, time, and transportation shall be without any discrimination of any kind in favor of either of said companies or adverse to the road or business of any or either of the others, and the purpose of Congress to secure a continuous line of road, operating from the Missouri River to the Pacific coast as one road, is further emphasized in the act of Congress of June 20, 1874, c. 331, 18 Stat. 111, making it an offense for any officer or agent of the companies authorized to construct the roads or engaged in the operation thereof, to refuse to operate and use the same for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one continuous line, and making it a misdemeanor to refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of or adverse to any or either of said companies. *Such practices of systematic and preconcerted*

> *discrimination as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific and be equally violative of the letter and spirit of the acts of Congress.* Certainly such discriminations could be restrained by the courts (*Union Pacific Railway Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 163 U. S. 564, 603, 604), and might possibly have resulted in a forfeiture of all rights under the acts of Congress. (Italics not in original.)
>
> Nor do we think it can be justly said that because of the connection with the Rio Grande road at Ogden the Southern Pacific was in position to discriminate at will against the Union Pacific in such wise as to greatly impair the latter road's carrying trade upon eastbound freight. (90)

This construction of the Pacific Railroad Acts follows from a consideration of the conditions under which they were passed and of the results sought.

These conditions and results have been considered by the court in a number of cases.

> *United States* v. *Union Pacific Railroad Co.*, 91 U. S. 72.
>
> *United States* v. *Union Pacific Railroad Co.*, 98 U. S. 569, 613.
>
> *Sinking Fund Cases*, 99 U. S. 700, 724, 751.
>
> *California* v. *Pacific Railroad Co.*, 127 U. S. 1.
>
> *United States* v. *Stanford*, 161 U. S. 412.
>
> *Central Pacific Railroad* v. *California*, 162 U. S. 91.

These acts were passed to secure a continuous railroad from the Missouri River to the Pacific Ocean. The title of the act of July 1, 1862, described " a railroad and telegraph line from the Missouri River to the Pacific Ocean." The body of the act provided that—

> The whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as *one connected, continuous line.*

The amendment of July 2, 1864, provided that—

> The several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the Government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, *without any discrimination of any kind* in favor of the road or business of any or either of said companies, or *adverse to the road or business of any or either of the others.* (Italics not in original.)

It has been argued for the defendants that "discrimination" in order to be within the prohibition of these acts must be not only *against* one of the railroads described in the act, but also *in favor of* one of these railroads. Upon this construction the defendants base the contention that any discrimi-

nation by the Central Pacific Railroad under the control of the Southern Pacific Company in favor of the Southern Pacific Railroad is not within these acts because the Southern Pacific Railroad was not one of those mentioned in the acts of 1862 and 1864.

This construction of these acts is not the reasonable one. There is nothing in the language that calls for any such construction. It is:

> Without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others.

This language covers any discrimination in favor of any one of these roads, or any discrimination against any one of these roads. There is no reason why Congress should wish to protect these roads against discrimination in favor of any one of these roads and be careless of protecting such road against discrimination in favor of some other railroad. Such discrimination would be just as injurious, even if the beneficiary of it was not incorporated under these particular acts. There is no reason for the distinction, and no such distinction is made by this court in dealing with the act in the Union Pacific case. On the contrary, the court says that the act would be violated by discrimination against the Union Pacific *in favor of the Denver & Rio Grande*, which is not mentioned in the act. It would be the same if it was in favor of the Southern Pacific.

The act of June 20, 1874, made it a misdemeanor for any officer or agent of any of the companies to refuse to carry out the provision above quoted from the act of 1864.

The benefits and burdens given and imposed by this section were peculiar to the particular companies to which the Government aid was extended.

This was not a mere codification of the well recognized principle of the common law that carriers must not discriminate. It differs in this respect from such a provision as that of the constitution of Colorado, which was construed in *Atchison, Topeka & Santa Fe Railroad* v. *Denver & New Orleans Railroad Company*, 110 U. S. 667, 672, 680. That provision was in favor of "all" individuals, associations, and corporations, and was imposed upon "any" railroad (672), and it contained no provision requiring operation in any respect as a "through" and "continuous" line (680).

The Pacific Railroad acts required operation as "one continuous line" and the discrimination prohibited was that adverse to the road or business of any or either of "the" others.

There were special reasons for these special provisions. Regardless of them, these corporations would be, by the common law, under a duty not to discriminate in the limited sense. This railroad was provided not merely for the ordinary public advantages that come to a particular region from the opening of a railroad. The need of a military highway to

the coast and of easy access for the East to the undeveloped West was national. It was thought to be so imperative as to warrant not merely giving the usual right of eminent domain, but also expending the public moneys and lands and extending the public credit. This made the relation of the United States to these railroads not only that of a sovereign, but also that of a creditor.

United States v. *Union Pacific Railroad Co.*, 98 U. S. 569, 613.

Sinking Fund cases, 99 U. S. 700, 724, 751.

The extension of unusual favors to these corporations warranted requiring the performance of unusual duties by them. The ordinary railroad, enjoying no special favor from the sovereign except the granting of the right of eminent domain, had not been required to enter into any business relations with any other railroad, beyond those undertaken voluntarily or with the public generally.

The component parts of this railroad were required to unify its operations and virtually to become one, except that they could maintain their separate corporate identities, and so make their profits and sustain their losses upon the particular section of the railroad which they respectively built and operated.

The United States was concerned in having a strong railroad not only because of its needs as a sovereign and the advantages in service which would come to the people of that sovereignty, but

also as a creditor, dependent for payment upon the success of this railroad.

The interests of the United States as a creditor demanded the financial success not only of the railroad company that might discriminate and gain financially thereby but also of the railroad company which might be the object of the discrimination.

As the United States could not obtain payment of the donated bonds, either principal or interest, for 30 years (*United States* v. *Union Pacific Railroad Company*, 91 U. S. 72), it was interested to secure the financial success of this railroad not only immediately but also for a long period in the future.

It was not open to doubt that the strength of the entire railroad would be increased if each part of it was cooperating for the success of the whole. It was to secure these results that Congress directed the operation of this road as one line and that no discrimination should be made by one part against the other.

The duty to operate as one continuous line and not to discriminate against parts of that line was a burden upon the franchise, and not merely upon the first corporations which acquired it. It was a condition to the acquisition and exercise of the franchise granted by the Pacific Railroad acts that it should be exercised in conformity to the requirements of these acts. The Central Pacific Railroad

Company could not convey the franchise to the Central Pacific Railway Company free of this burden.

Union Pacific Railroad Co. v. *Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160.

United States v. *Union Pacific R. R. Co.*, 226 U. S. 61, 92.

Those in control of the Central Pacific Railroad are now and always have been under a duty not to discriminate against the Union Pacific Railroad in favor of the Southern Pacific Railroad.

SECOND.

THE COMBINATION INTO THE SOUTHERN PACIFIC COMPANY WHICH CREATED THE LIVELY INCENTIVE TO DISCRIMINATE AGAINST THE UNION PACIFIC RAILROAD WAS IN ITSELF VIOLATIVE OF THAT DUTY, EVEN IF NO ACTUAL DISCRIMINATION OCCURRED.

With the Central Pacific Railroad Company under a duty not to discriminate against the Union Pacific Railroad, it would seem to be evident that any device by which the operation of its railroad was put into the control of those whose interest it was to discriminate against the Union Pacific Railroad would be *ipso facto* violative of that duty and unlawful. Parties should not be permitted by their voluntary acts to put themselves in a situation where their self-interest constantly prompts them not to perform their legal duties.

The combination into the Southern Pacific Company was just such an act. The Central Pacific Railroad Company, under the control of those inter-

ested exclusively in developing its business, would naturally strive to forward as much freight as possible to and from California through Ogden in preference to El Paso. The Southern Pacific Company, controlling the Central Pacific Railroad and the Southern Pacific Railroad, would naturally strive to forward all the freight possible to and from California through El Paso and Galveston and New Orleans, in preference to Ogden. The duty of the Southern Pacific Company to earn revenue for its stockholders would require of it the course of conduct which would increase that revenue. This duty was absolutely inconsistent with the duty to press for the success of the Ogden gateway. This inconsistency in the position of the Southern Pacific Company was created by its action in taking control of the Central Pacific Railroad, whose duties were directly opposed to the interests of the Southern Pacific Railroad.

Even if the Southern Pacific Company had performed the impossible task of doing everything that it could to further the interests of the Southern Pacific Railroad, and, at the same time, of doing everything that it could to further the interests of the Central Pacific Railroad, with its inconsistent duties, it would not render lawful the combination which produced the inconsistency. It is unlawful to contract oneself into a position where self-interest will conflict in this way with the performance of duty.

For a rival line to take control of the operation of the western half of the Central-Union line was destructive of the natural cohesion between the Central and the Union which was essential to make the two parts in operation one line. It materially diminished the power of the eastern half in its competition with the rival line, and it destroyed entirely that of the western half.

Even if the action of the western half fell short of affirmative discrimination against the eastern half and in favor of its rival, the paralysis of the incentive to build up the business of the older road, with a consequent subtraction from that of the controlling rival, would inevitably retard, if it did not destroy entirely, the success of the older road. The creation of the situation which would render this even possible was contrary to the laws which had prescribed that these two halves should have all the potential success which would come from real cooperation as one line from the Pacific coast to the Missouri River.

This combination was more than mere negative cessation of competition by the western half. It was the taking of an affirmative step calculated to produce this cessation, and to deprive the older road of its natural incentive to effort and its consequent chance of success.

The Pacific Railroad laws required of these railroads not only unity in track connections and train operation, and through rates and service, but also

required a road operating from the Missouri River to the Pacific coast "as one road." *U. S.* v. *Union Pacific Railroad Co.*, 226 U. S. 61, 91.

No railroad, one-half free and one-half in the bondage of a rival, could be operated as one road. Such a control, tending against the fulfillment of the requirements of the law, is to be judged by its tendency and not merely by its success. So tested, this control is an unreasonable and an unlawful restraint.

The defendants have stated the contention for the petitioner to be that the Pacific Railroad acts required the Central Pacific Railroad to solicit actively and exclusively for the Union Pacific Railroad. This is not an accurate statement of the Government's position.

It is one thing to say that this railroad must solicit actively and exclusively for the Union Pacific Railroad. It is quite another to say that it must abstain from soliciting actively against the Union Pacific Railroad.

Soliciting freight with indifference as to the line over which it should be forwarded is not discriminative in the same sense as solicitation directed in favor of a particular line, and therefore against another particular line.

If the Central Pacific Railroad, with indifference to the forwarding line, had sought to get all the freight that it could carry and had not tried to keep it away from the Union Pacific Railroad, the natural tendency would have been for much of the freight

to go over the Union Pacific Railroad which has gone instead over the Southern Pacific Railroad.

The control of the Central Pacific Railroad by the Southern Pacific Company was contrary to the Pacific Railroad Acts, not necessarily because of its tendency to stop solicitation by the Central Pacific Railroad *exclusively in favor of* the Union Pacific Railroad, but because of its tendency to produce solicitation by the Central Pacific Railroad *against* the Union Pacific Railroad. And it was this tendency, and not its success, which determined the unlawfulness of this control.

It distorted the normal development of the Central line in competition with the Southern line and deprived the public of the advantages to be expected from such competition required by the Pacific Railroad Acts.

THIRD.

THERE HAS BEEN LONG CONTINUED DISCRIMINATION AGAINST THE UNION PACIFIC RAILROAD AS A RESULT OF THE COMBINATION.

The discrimination prohibited has been defined by this court to include conduct tending to divert traffic from the Union Pacific Railroad and to other railroads—namely, "such practices of systematic and preconcerted discrimination as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden." (226 U. S. 61, 91.) These practices consisted of active and persistent solicitation (Munroe, 377), and nothing more.

It is admitted that these practices of the Southern Pacific Company have been systematic and preconcerted. (Spence, 1155; Connor, 338.)

Since 1883 and up to the present time it has been the regularly established and systematic practice of the Southern Pacific Company to divert all the freight possible between California, Oregon, and Nevada in the West and the Middle West and the Atlantic seaboard on the East from the Ogden gateway to the Southern Pacific Railroad via El Paso and New Orleans or Galveston. (Sproule, 183, 184, 185, 189, 202, 203, 239, 255; Lovett, 289, 292; Connor, 338, 340, 329, 330, 360, 365; Munroe, 375, 376, 377, 378, 383, 371, 387; Schumacher, 149, 152, 174; Kruttschnitt, 739, 741, 808, 810, 825, 827; Chambers, 966; Lincoln, 113, 114; Spence, 1034, 1036.)

The evidence on this subject comes largely from the defendants' own witnesses and is not disputed. Yet the opinion of the court below contains no reference whatever to any of this evidence, or to the opinion of the Supreme Court in the Union Pacific case defining the duty of the Central Pacific Railroad not to discriminate (2328).

The natural, shortest, quickest, and best route between central and northern California on the West, and the Middle West territory and Atlantic seaboard on the East, during all this time, has been the Central Pacific-Union Pacific route. (Stubbs, 100; Lincoln, 127; Schumacher, 147; Lovett, 290, 293; Connor, 331, 343, 346, 363; Sproule, 205, 209, 210, 378; Munroe, 370, 375.)

The distance from San Francisco to New York City via the Central Pacific Railroad and the Union Pacific Railroad is 3,191 miles, and from San Francisco to New York City via rail to New Orleans and water to New York is 4,225 miles. To interior points in Atlantic seaboard territory the distance via the Union Pacific Railroad is even less, and via New Orleans correspondingly more. Buffalo is 442 miles short of New York City by the Union Pacific route and that much beyond New York by the water route. (Sproule 207.)

The distance from San Francisco to Cincinnati via the Central Pacific Railroad and the Union Pacific Railroad is 2,559 miles, and via New Orleans it is 3,323 miles. (P. Ex. 67, p. 1668.) Freight from Cincinnati to San Francisco via New Orleans moves 836 miles to reach New Orleans, and is then 72 miles, only, nearer San Francisco than when it started. (P. Ex. 67, p. 1668.) Of the 2,559 miles from Cincinnati to San Francisco, 1,000 miles are on the Union Pacific Railroad and 783 on the Central Pacific Railroad, a total of 1,783 miles. (Sproule, 206.) The advantage in distance via the Union Pacific Railroad and Central Pacific Railroad over the route via New Orleans increases as the point of origin moves northerly from Cincinnati.

The advantage in distance of the Union Pacific-Central Pacific route over the New Orleans route is even greater for northern, central, and eastern California and for southwestern Oregon than it is for

San Francisco. The junction point at Roseville is farther than San Francisco from El Paso and New Orleans and 107 miles nearer than San Francisco to Ogden. Every mile east of Roseville reduces by so much the distance over the Ogden route and increases correspondingly the distance over the El Paso or New Orleans route.

The ordinary time in transit for freight between San Francisco and New York is two or three days shorter by the Central Pacific-Union Pacific route than by the New Orleans route. (Munroe, 375.) The difference to Cincinnati is a trifle greater. (Connor, 342.) Delays on the route over the Central Pacific Railroad and the Union Pacific Railroad and eastern connections to the Atlantic seaboard seldom have occurred during the period since 1887. (Connor, 343, 344; Monroe, 375; Richardson, 639.) They have been no greater than on the Sunset Route. (Richardson, 639; Connor, 344.)

Freight requiring particularly rapid transportation and good service, such as valuable cargoes of silk from the Orient and deciduous fruits, have been moved over the Central Pacific Railroad and the Union Pacific Railroad to the exclusion of the Southern Pacific Railroad. (Lincoln, 113; Spence, 209; Schwerin, 700.)

Mr. Connor testified that, if not artificially diverted by solicitation, 75 per cent of the freight from northern and central California would go through Ogden, 20 per cent over the Atchison,

Topeka & Santa Fe Railway, 5 per cent over the Western Pacific Railway, and nothing over the Southern Pacific Railroad. (Connor, 337, 363.)

Notwithstanding these natural advantages, the Central Pacific Railroad, under the control of the Southern Pacific Company, has diverted traffic from its own rails and those of the Union Pacific Railroad to a large amount and for many years.

Before 1899 the Southern Pacific Railroad via the New Orleans route carried probably more than one-half of the Atlantic seaboard competitive business, probably as high as 80 or 90 per cent. (Chambers, 942.)

In the eighties probably as much as 90 per cent of the New York-San Francisco business was moved over this route. (Schumacher, 155.) In 1890 this route had secured the major part of the westbound traffic between the Atlantic seaboard and California of a character in which it could engage (Spence, 1028), and it continued to handle the major part of that traffic until 1895. (Spence, 1029.)

The Central Pacific Railroad and the Union Pacific Railroad have been operated as one railroad in the sense only that they have had joint through rates and through trains, but in no other respect. (Schumacher, 172, 173; Richardson, 636, Spence, 1045; Kruttschnitt, 728, 729.) In this sense the Southern Pacific Railroad and the Rock Island, El Paso, and Southwestern Railroads are operated as one railroad, (Spence, 1152.) In this sense the

Central Pacific Railroad and the Denver & Rio Grande Railroad are operated as one railroad. (Richardson, 639.) Mr. Richardson, superintendent of transportation of the Southern Pacific Company, testified that in this respect there is no difference between the treatment accorded the Union Pacific and that accorded the Denver & Rio Grande and El Paso and Southwestern as far as he knows (638).

Since the so-called merger between the Union Pacific and the Southern Pacific in 1901, the passenger advertising funds of the Southern Pacific for westbound business have been placed in the hands of the Union Pacific Railroad Company, and the corresponding funds of the Union Pacific for eastbound business have been placed in the hands of the Southern Pacific Company. (Spence, 1046, 1157.) This is confined to passenger business and is not confined to the Union Pacific Railroad.

Prior to the time at which the Union Pacific Railroad Company acquired the control of the Southern Pacific Company, in 1901, the condition of the Central Pacific Railroad was much inferior to what it became thereafter. (Kruttschnitt, 814, 815; Munroe, 379; Schumacher, 152; Chambers, 978.)

The Union Pacific Railroad Company, in its answer in the suit of the *United States* v. *Union Pacific Railroad Company, The Oregon Short Line Railroad Company, and others* (D. Ex. 50, p. 2097), states:

> That the lines of railroad now owned by defendant Union Pacific Railroad Company had been greatly improved while in the

hands of receivers in the foreclosure proceedings hereinbefore mentioned, and prior to January 1, 1901, it recognized the necessity, in the interest of the public as well as of itself, of further improving, and it had determined to further improve, the said railroads, particularly the line between Council Bluffs and Ogden, in order to be able to develop its traffic and serve and accomplish the object of its construction, and to handle such traffic efficiently and economically. Unless the line of the Central Pacific Railway Company, extending from Ogden to the Pacific Ocean, was likewise improved and put and maintained in condition to handle promptly and efficiently the transcontinental traffic passing over the Union Pacific Railroad, the improvement of the latter, as contemplated, would be practically futile. The said Central Pacific Railroad had been mortgaged for large amounts, and the Central Pacific Railway Company was without means or credit to procure the means necessary to bring by improvements its said line of railroad up to anything approximating the condition and efficiency of said Union Pacific Railroad, and the Southern Pacific Company was also without such means or credit, as practically all of its assets and the assets of the various corporations controlled by it were mortgaged or otherwise pledged.
* * *

For the purpose of procuring the improvement of the said Central Pacific Railroad and to bring it up to the standard and degree

of efficiency approximately of the line of the Union Pacific Railroad, and in order that said Union Pacific Railroad Company should become and securely remain the preferred connection of said Southern Pacific Company and Central Pacific Railway Company at Ogden, and thereby secure the unrouted traffic of said companies interchanged at Ogden, and in order to protect itself against the acquisition and control of said Central Pacific Railway Company by adverse interests to these defendants, and without any intent or purpose in any wise to suppress or restrain any competition in interstate or foreign commerce, the said 900,000 shares of the capital stock of said Southern Pacific Company were purchased and acquired as hereinbefore alleged by defendants, Union Pacific Railroad Company and Oregon Short Line Railroad Company, and are now so held by the company last named.

Prior to 1901 the expenditure of the Central Pacific Railroad Company for maintenance of ways and structures varied between $1,100,000 and $2,500,000 annually. (P. Ex. 37, p. 1635.) During the same period the expenditures on the through route of the Southern Pacific Railroad from San Francisco to New Orleans varied between $2,500,000 and $4,800,000 annually. (P. Ex. 38, p. 1636.) Between January 1, 1887, and June 30, 1901, the expenditures of the Central Pacific Railroad Company for additions and betterments, not including new lines, amounted to $10,268,410.01. (P. Ex. 39,

p. 1636.) Between March 1, 1885, and June 30, 1901, the expenditures for the same purposes on the through route of the Southern Pacific Railroad from San Francisco to New Orleans amounted to $30,346,240.10. (P. Ex. 40, p. 1637.)

When the Union Pacific obtained control of the Southern Pacific Company there was inaugurated an era of great improvement of the Central Pacific Railroad (Sproule, 239), and the roadbed of the Union Pacific Railroad and the Central Pacific Railroad and the service over the rails of these two roads was greatly improved. (Sproule, 239, 240.) The Union Pacific Railroad could not, prior to 1901, without the cooperation of the Central Pacific Railroad, make effective any effort for improved service between Omaha and San Francisco Bay. (Sproule, 240.)

The Union Pacific Railroad, during the period prior to 1901, was in advance of the Central Pacific Railroad. (Munroe, 379.) Mr. Munroe, vice president of the Union Pacific, never knew of any action taken by the Southern Pacific Company in the administration of the Central Pacific Railroad looking to the betterment of the Central Pacific route as against the Southern. (Munroe, 388.)

Prior to 1901 the Central Pacific Railroad was a fairly good dirt railroad, with very little ballast except over the mountains on their heavy grades, and laid with 60 or 70 pound rails and kept up just fair. After the merger, so called, in 1901, considerable sums were spent in the upkeep and improve-

ment of the Central Pacific line, and the efficiency and comfort of the road before was about 50 per cent of what it has become since. (Schumacher, 152.)

The Southern Pacific Company kept its freight service over the Sunset line to New York better than any other up to a period after 1901, and continued to do so until the all rail lines had arranged their service so as to make it equal with the Sunset Route service. (Chambers, 979.) Up to the time that the competition of the Atchison made it necessary, Mr. Chambers, vice president of the Atchison did not recollect any efforts of the Southern Pacific Company to make its service through Ogden equal to or preferable to that via the Sunset line. (Chambers, 963.) The service from the Atlantic seaboard to Chicago was always much better for the distance hauled, as long as he could recall, than it was west of Chicago. The lines leading from New York to Chicago—the Pennsylvania, the New York Central particularly, and the Erie—have an expedited merchandise service, a fast service, that they have had for years. They had it at the time that the Atchison first began to make an effort to get seaboard business. They did not have to improve their service very much. The improvement had to be west of Chicago. They had made no great effort to secure the California traffic as against the Sunset Route, because the service could not be equaled under the arrangements they had with western lines, and the western lines were not in

a position to equal the service of the Sunset Route, but they gradually got better, and there was an improvement in billing, the making of the through way bills, the prompt settlement of claims, and avoiding transfers. The Iowa lines, most of them, are in very good shape, and some of them have been for 25 years. The difficulty in bringing up the all-rail service was with the lines west of Omaha and west of the Colorado junctions. The Union Pacific has always been a first-class road since 1887, and the Ogden route has always given very good service. (Chambers, 980.)

Mr. J. C. Stubbs, who is now on the pension rolls of the Southern Pacific Company, was the one having the important say as to the methods of developing the traffic for the Southern Pacific Company prior to 1901, and if any effort had been made to organize through service via Ogden from the Atlantic to the Pacific, it is likely that it would have been made by Mr. Stubbs. (Spence, 1122.) He was not called by the defendants as a witness. Mr. Spence could not tell whether he had ever talked with Mr. Stubbs as to such effort. He did not recall Mr. Stubbs having informed him of any effort that he made after the opening of the Sunset Route to get coordination between the eastern roads and the Central Pacific and the Union Pacific. Mr. Edwin Hawley, the general eastern agent of the Southern Pacific Company, and subsequently assistant general traffic manager, and one of the ablest railroad men of his day, worked

directly and through his subordinates in securing traffic for the Southern Pacific Company, preferentially via the Sunset Gulf Route. Mr. Hawley remained with the Southern Pacific Company up to March 1, 1902. (Spence, 1123.) The success of the Sunset Route was due to the influence of the Southern Pacific being exerted in favor of that route. (Spence, 1117.)

Mr. Chambers, representing the Atchison, Topeka & Santa Fe Railroad, had to do personally with the improvement of the all-rail service so as to compete with the Sunset Gulf line. The Atchison was the first to arrange for through billing from New York to the Pacific coast points and to run through cars (Chambers, 943), in 1889 or 1890. This was not done generally by the all-rail carriers. The Erie-Santa Fe arrangement was the first through billing in connection with all-rail lines. The practice before was for each line to make its own way bill and collect its proportion of the joint rate from its connecting carrier, so that all except the last charges were payable as advance charges, which made it necessary for the shipper to go back to the connecting railroads in case of an overcharge. In the through billing the total charge could be corrected by the agent at destination. (Chambers, 943.) The local billing was very cumbersome and very unsatisfactory. The through billing was one of the strongest points in the Sunset Route. Mr. Chambers thought it was about 1900 before the all-rail lines generally adopted the practice of through billing;

that they came in one after another (944). Of course this resulted in an improvement of the all-rail service and in diminishing the proportion of the traffic obtained by the Sunset Gulf Route. When he made his first through billing arrangements with the Erie Railroad, about 1889, it was the first time there had been any effective competition from the Atlantic seaboard against the Sunset Route. (Chambers, 959.) It took some years to work any considerable volume of business, because the Atchison line was not in very good physical condition. As the condition and service improved the volume of business increased, and the great improvement came after 1895. (Chambers, 958.) The Atchison competition with the Sunset Route in the beginning was just for the southern California business. It did not reach to any extent into northern California. (Chambers, 959.) The through billing through Ogden followed along after that time. The Atchison did not make very much of an effort to compete with the Sunset Route from New York to northern California until after 1900. It was not in a position to compete effectively up to that time. (Chambers, 959.)

Mr. Spence testified that he was not sure whether the Atchison was a pioneer in the through billing; that through billing was very uncommon in the early days; that he should say that the Southern Pacific began through billing through Ogden in the early nineties; that he could not state from memory accurately (1115). He could not tell when through-

package cars began to be run. He did not think they preceded through billing (1115). He testified that there was difficulty with the lines east of Omaha; that he did not and would not know whether the Southern Pacific Company ever attempted to organize coordination with those lines for through business 1117). If the Southern Pacific line in California had stopped at the southern boundary of the State, if the Southern Pacific had not been in the management of the entire line from coast to coast, the Sunset Route, in his judgment, would never have been able to secure a substantial share of the traffic between Atlantic seaboard territory and California; and if the Southern Pacific's short haul had been to Los Angeles and its longer haul to Ogden, or, in other words, if the influence of the Southern Pacific Company upon that traffic had been exerted in favor of the Ogden haul, the Sunset Route could never have made the progress that it made in getting business; that the Southern Pacific would naturally have preferred its long haul. (Spence, 1120.)

The Southern Pacific Company has made lower rates on some commodities via the Southern Pacific Railroad than by the Central Pacific-Union Pacific Railroad. (P. Ex. 30, 31, pp. 1599, 1611; Topping, 275.) At times the number of these commodities has exceeded 100. (P. Ex. 30, 31, pp. 1606, 1604, 1601.) They made a 55-cent rate from California to New York on wine in tank cars via New Orleans, with right to barrel in transit, against 75 cents all-rail, with the added advantage that as barrels originated

largely in Louisiana and Arkansas the shipper is saved the freight on the empty barrels.

The natural effort of the Union Pacific-Central Pacific line, if it were operated as one continuous line, would be to have all the freight business moved over that line. (Spence, 1163; Kruttschnitt, 826; Richardson, 638; Munroe, 378.)

Notwithstanding the natural advantages of the Central Pacific-Union Pacific route to and from all points north of Tehachapi Pass, the Central Pacific Company, under the control of the Southern Pacific Company, has diverted traffic from its own rails and those of the Union Pacific Railroad to an enormous extent. (Chambers, 942; Spence, 1028, 1119; Schumacher, 150.)

Not only has there been a failure to advance the use of this route for commodities which could be induced to move by the Southern Pacific route through Galveston or New Orleans, but also there has been a very active contrary effort on the part of the Central Pacific Railroad, under the control of the Southern Pacific Company, to have as little freight of this kind as possible move over the Central Pacific-Union Pacific route. (Connor, 329, 330–332, 338, 339, 343, 345, 360, 364, 365; Schumacher, 159, 173; Sproule, 183–185, 188, 197, 203, 204, 208, 212, 213, 214, 239, 240, 255; Chambers, 942; Johnson, 311; Hall, 312; Munroe, 371, 374, 375, 376, 377, 378, 380, 381, 382, 384, 387, 388; Lincoln, 113, 114, 130, 147, 150, 151, 152; Lovett, 289, 293, 294, 297, 303; De

Friest, 305; Kruttschnitt, 739, 741, 767, 808, 810, 813, 816, 825, 827; Spence, 1036, 1037, 1034, 1028.)

Solicitation has a substantial effect upon the routing of freight. (Chambers, 946; Sproule, 211, 239.)

Solicitation for freight traffic is constant day in and day out. (Schumacher, 166, 167.) The soliciting done by the Southern Pacific had the effect of diminishing the amount of traffic which normally would go over the Central Pacific and Union Pacific Railroads. (Schumacher, 173; Connor, 345.)

The Southern Pacific prior to 1901 would not solicit business to go by way of the Central Pacific Railroad. (Lincoln, 113.) Mr. Lincoln, of the Missouri Pacific, had never known of such a thing prior to that date. (Lincoln, 113, 114.) There were no separate traffic representatives for the Central Pacific Railroad. (Lincoln, 123.)

Mr. Connor testified that they devoted their exclusive time and attention to securing the freight from California to his territory for the New Orleans route, and bent every effort with everybody who could lend any assistance; that their receiving agents and solicitors in California, if it was controlled there, were notified and appealed to for assistance; that if the control rested at Chicago, St. Louis, Pittsburgh, or New York, or in any other point, they went after it through their representatives there; and that if it was controlled in his territory he looked out for it there; and that they all pulled together all the time and worked every means known to influence and secure the shipment for that route, and never let up

until the shipment was on the cars moving (Connor, 328, 329); that the Southern Pacific was a very powerful railroad, and looked upon as such by the receivers in California and by the shippers there; and that they cultivated them and tried to do everything they could for their interest and to build up their confidence in that road; that they traced their freight; that they gave them reports on its movement and route, and that they kept them more than satisfied; and that the Southern Pacific Company in California is a very influential road, and that if there were any new industries or industrials being located there, if they were on local territory requiring sidings, the Southern Pacific Company naturally had to put them in; that if there was any material to be moved from the East to complete these industrials and plants it was one of the first things their Southern Pacific solicitors did to see that business was routed to the greatest extent by the long haul; that is, via New Orleans and over the Southern Pacific Railroad (Connor, 329); that there were many times during the period before 1901 when the published tariff rates through New Orleans were cut, although the Southern Pacific Company was not an instigator thereof; that the Southern Pacific Company was a great, big, powerful road, and that they brought pressure to bear in California to make it to their interest to give them the business (Connor, 345); that the Southern Pacific Company supplied him with special equipment required for the shipment of freight from his territory—namely, a special type of

cars for carrying buggies and furniture—and that this equipment was for use exclusively through New Orleans and over the Southern Pacific Railroad (Connor, 330), and no similar equipment was provided for the Central Pacific Railroad; that from 1887 to 1901 the Southern Pacific Company, which operated the Central Pacific Railroad, gave no assistance to the Union Pacific Railroad to secure any freight via Ogden which could be secured via the Southern Pacific Railroad (Connor, 340); that the other connections of the Union Pacific Railroad, such as the Chicago & North Western, the Chicago, Milwaukee & St. Paul, the Illinois Central, the Chicago & Great Western, and the Chicago & Alton, lend their assistance to the Union Pacific Railroad in securing freight traffic (Connor, 340); that there was an absence of competition between the Central Pacific Railroad and the Southern Pacific Railroad; that the Southern Pacific Company had a prescribed blank to be filled out when any agent learned that any freight had traveled over the Central Pacific Railroad from Mr. Connor's territory, to be followed by an immediate call on the shipper in the effort to make him ship no more that way, but to employ the route over the Southern Pacific Railroad (Connor, 338), and that these instructions were received, transmitted, and carried out constantly (Connor, 339); that if the routing was controlled in California the efforts were applied there, and that failing to get the routing changed they looked upon the shipment as lost (Connor, 330), and that he as agent of the Southern Pacific

Company worked the business via the Southern Pacific Railroad first, last, and all the time. (Connor, 359.)

Mr. Schumacher testified that prior to 1901 he had never known of any effort of the Southern Pacific Company to get any transcontinental freight over the Central Pacific Railroad to any point east of the dead line near Indianapolis and Detroit, except that which it was unable to control for the other route (Schumacher, 147, 152); that at that time very little of the transcontinental freight from central and northern California moved over the Central Pacific Railroad through Ogden, because of the strong local organization of the Southern Pacific Company in California. (Schumacher, 149.)

Mr. Lovett, the chairman of the executive committee of the Union Pacific Railroad Company, testified that there is no competition between the Central Pacific Railroad and the Southern Pacific Railroad (Lovett, 292); that the Central Pacific Railroad does not work the business from the Atlantic seaboard territory at all, except where it can not get it by the southern route (Lovett, 289); that the Central Pacific Railroad is not a factor in it at all. (Lovett, 293.)

The effort of the Southern Pacific Company to divert the freight from the natural course through Ogden was extended even to freight originating on the lines of the Central Pacific Railroad or moved over those lines in northern and central California and in Nevada. (Kruttschnitt, 825.)

In consequence of their effort the Nevada wool shipments destined to New York and Boston originating on the lines of the Central Pacific Railroad and which, of course, would move through Ogden and over the Central Pacific Railroad (Munroe, 378), were induced to move via Sacramento, El Paso, and New Orleans to New York and Boston. The Central Pacific Railroad, under the control of the Southern Pacific Company, published rates for this wool via El Paso and the Gulf routes from points in Nevada and as far east as Corinne, Utah. (P. Ex. 32, p. 1621; Topping, 282.) Up to September 14, 1909, the Southern Pacific Company made no through commodity rates via Ogden on wool from any point west of Elko, Nev. This kept the Ogden gateway closed. On that date rates were published for points in Nevada as far west as Winnemucca, and on June 25, 1910, they were published for points west of Winnemucca. (Munroe, 371.)

Prior to these dates the movement of wool via Ogden was very limited, and the great bulk of it moved via Sacramento and El Paso to New Orleans and by boat to New York, and thence by transfer to Boston. (Munroe, 371; Schumacher, 152; Sproule, 219, 221.) Winnemucca is 365 miles west of Ogden and 2,774 miles from New York via Ogden, and is over 4,550 miles from New York via Sacramento, El Paso, and New Orleans. It is farther from New Orleans than it is from New York, and transshipment at New Orleans is necessary, and in the case of wool for Boston another transshipment at New York is neces-

sary. Cars through Ogden would go directly to New York or to Boston. Elko is 140 miles east of Winnemucca and correspondingly nearer New York and farther from New Orleans. The advantages of the Ogden route were apparently such that between Elko and Corinne, where the rates were published both ways, little or no wool could be induced to go via the long route. (Sproule, 219; Munroe, 381.)

It is contended for the defendants that the failure of the Union Pacific Railroad Company to change the routing of Nevada wool when that company came into control of the Southern Pacific Company shows that that routing was not a discrimination against the Union Pacific Railroad. This contention is unfounded. When the Union Pacific Railroad Company acquired control of the Southern Pacific Company it obtained a 46 per cent interest in the stock, and therefore in the earnings, of the Southern Pacific Company. If Nevada wool was routed back through California and via the Southern Pacific Railroad through New Orleans and to New York, the Union Pacific Railroad Company received 46 per cent of the revenue. If it was routed from Nevada through Ogden to New York, the Union Pacific Railroad Company received a much smaller percentage of the revenue—that is, received 100 per cent of the revenue for the haul from Ogden to Omaha, and 46 per cent of the revenue for the haul from Nevada to Ogden, but it received nothing for the haul from Omaha to New York.

Its interest as a stockholder in the Southern Pacific Company neutralized or overcame its interest, as the company operating the Union Pacific Railroad, as to this Nevada wool traffic.

The effect of solicitation upon the movement of traffic is shown by the results of the so-called merger between the Southern Pacific Company and the Union Pacific Railroad Company, on the eastbound traffic over the Denver & Rio Grande Railroad from Ogden. Prior to this merger the Central Pacific Railroad had two outlets at Ogden for its eastbound traffic—one over the Union Pacific Railroad, and the other over the Denver & Rio Grande Railroad—and a substantial part of this traffic moved over the latter road. (Sproule, 238.) Mr. Schumacher estimated the amount at 45 per cent (168). This proportion was materially reduced after the merger, so that the Denver & Rio Grande Railroad felt it necessary to build the Western Pacific Railway to the coast. (Schumacher, 151; Sproule, 238.)

This change in routing was accomplished without the closing of any gateway, and by the efforts of the Southern Pacific Company (Munroe, 377; Sproule, 238), and its active and persistent solicitation. (Munroe, 377.)

Mr. Kruttschnitt testified that the effort of those in charge of the Central Pacific Railroad at all times between 1883 and 1901 was to induce as much traffic as possible to travel, not over the Union Pacific, but over the Sunset line (825, 810, 767, 739), irrespective

of whether the freight originated on Southern Pacific tracks or on Central Pacific tracks (825).

Representatives of eastern connecting railroads testified that it is customary for connecting railroads to assist each other to get traffic over their lines, but that the Central Pacific Railroad and the Southern Pacific Company gave no assistance to the connections of the Central Pacific Railroad to get any traffic over the Central Pacific Railroad which could be influenced to go over the Southern Pacific Railroad (De Friest, 305; Johnson, 311; Hall, 312), and that the indifference of the Southern Pacific Company toward the Ogden gateway since the unmerging of the Union Pacific-Southern Pacific combination is as great as it was before the formation of that combination in 1901. (De Friest, 305.)

Mr. Sproule testified that as to all freight which can be obtained for the Southern Pacific Railroad the effort of the Southern Pacific Company is directed against the success of the efforts of the connecting railroads which seek to obtain freight to move over the Central Pacific Railroad, (189, 197, 213); that the Southern Pacific Company seeks to get for the Southern Pacific Railroad all the business between California and the Atlantic Seaboard which can be persuaded to that route (183); that it does not seek to get for the Central Pacific Railroad any of that business that can be controlled for the Southern Pacific Railroad (184, 185), except certain particular commodities which can not be carried advantageously over the southern route; that prior to 1901 the

Southern Pacific Company exerted this same effort as to the Central Freight Association territory (202); that their effort was to get the Oregon business to go via the Southern Pacific through El Paso (204); that it worked for its long haul (217, 255); that it was the practice before 1901 to watch the movement of traffic through Omaha and to follow up shippers to see whether they could be persuaded to send it over the Sunset Route (240); that the policy of the Southern Pacific Company since the dissolution in 1913 of the Southern Pacific-Union Pacific merger is the same as it was before the formation of that combination in 1901, (201).

This same practice of systematic and preconcerted discrimination against the Union Pacific Railroad in favor of the Southern Pacific Railroad has been continued for years by the Central Pacific Railroad under the control of the Southern Pacific Company. (Spence, 1155.)

Mr. Spence testified that if it could not secure the business for the southern route its effort was to secure it via Ogden, and if it could secure the business via the southern route to and from the territory described, either through New Orleans or, prior to 1901, through the Texas gateways (1126), its effort was not to have it go by Ogden, and that the effort was systematic and preconcerted (1155, 1156). Mr. Connor and Mr. Munroe testified that this systematic and preconcerted discrimination against the Union Pacific Railroad continued up to the so-called merger in 1901. (Connor, 338; Munroe, 375.) Mr. Munroe

testified that this discrimination is still kept up and that a large volume of traffic is diverted. (Munroe, 376.)

If not artificially diverted, substantially all freight moved by the Southern Pacific Company between points in California north of Tehachapi Pass, and in Nevada and southwestern Oregon on the west, and all points east of the Missouri River at or north of the latitude of St. Louis, Mo., on the east, would be moved over the Union Pacific Railroad as the shortest, quickest, and best route.

If the Union Pacific-Central Pacific line was operated as one continuous line the natural effort would be to move all the freight possible over that line. (Richardson, 826; Kruttschnitt, 638; Spence, 1163.)

The evidence is overwhelming that ever since the organization of the Southern Pacific Company the effort of that company and of the Central Pacific Railroad, under the control exercised by the Southern Pacific Company, has been to keep as much freight as possible from going over the Union Pacific Railroad and to divert it to the Sunset Route, except that freight which experience has shown could not be so diverted.

The efforts of the Southern Pacific Company have been directed against the efforts of other railroads, even when they were seeking to secure freight to be moved over the Central Pacific Railroad (Connor 338, 339, 330; Spence, 204.)

The attempt at diversion has been very successful. The amount diverted has been enormous.

(Chambers, 942; Spence, 1028, 1119; Schumacher, 149, 174.)

The diversion has been due to these efforts. If the Southern Pacific Company had exerted itself in favor of the Ogden route, the Sunset route could never have made the progress that it made in getting business. (Spence, 1119.)

The discrimination has gone to the point of giving lower rates by the Sunset route and of furnishing special equipment which the Southern Pacific Company would not permit to be used over the Ogden route.

The discrimination has been extended to freight originated or delivered on the Central Pacific Railroad, and even as far east as Nevada. Unquestionably, if the Central Pacific Railroad and the Union Pacific Railroad were operating "so far as the public and Government are concerned, as one continuous line," Nevada freight originating on the Central Pacific Railroad and destined to New York or Boston would not move through Sacramento, El Paso, and New Orleans. Under control of the Southern Pacific Company this is the course which it did in fact take. The arrangement of the wool rates practically necessitated this route until 1909. The Ogden gateway was closed to virtually all of this traffic until 1909 and 1910.

It is the effort, regardless of its success, which constitutes the discrimination. These practices of systematic and preconcerted discrimination

against the Union Pacific Railroad continued at least from 1887 to the time of the so-called merger in 1901.

This practice was more marked than the discrimination of the Southern Pacific Company in favor of the Union Pacific Railroad against the Denver & Rio Grande Railroad at Ogden, because this last consisted of a choice of two railroads both extending eastward from the common point at Ogden, whereas the choice of the Central Pacific Railroad, discriminating against the Union Pacific Railroad, has been of a most circuitous and broken rail and water route. This less marked discrimination against the Denver & Rio Grande Railroad was what the court said in *United States* v. *Union Pacific Railroad*, 226 U. S. 92, was contrary to the requirements of the Pacific Railroad acts, if practiced against the Union Pacific Railroad.

THIRD ASSIGNMENT.

The payment by the Central Pacific Railroad Company of its debt to the United States and the transactions leading thereto did not exempt the Southern Pacific Company from the provisions of the Sherman Anti-trust Act of July 2, 1890, or permit that company to make a combination which otherwise would be one in restraint of trade, because (1) the settlement commission did not seek any guaranty by the Southern Pacific Company, (2) the contract of settlement did not require such a guaranty, (3) the United States received only payment of a debt already due and adequately secured, (4) neither the commission,

nor the President, nor the Congress purported to give this company a special indulgence to make a combination in restraint of trade, prohibited as a crime by general law to all other corporations, and (5) such a special indulgence or advance pardon is beyond the constitutional power of the commission, the President, and the Congress.

The defendants claim that the conduct of the United States in connection with receiving payment of this debt amounted to an estoppel which would prevent the United States from maintaining this petition.

The court below apparently did not approve of this contention. The opinion contains no reference to any estoppel. It apparently attaches importance to the action of the settlement commission, but in just what way is not made apparent. The court describes the settlement proceedings in detail, and then refers to "the persuasive force of an administrative construction of statutes" (2333). From what follows it is not apparent whether the court refers to an administrative construction of the antitrust act, or to an administrative construction of the act under which the commission was appointed. It says:

> We do not say the commission was authorized to violate or to sanction the violation of the Act of Congress, but the adjustment they effected necessarily involved the question of its pertinence to the question in hand (2334).

With this comment the effect of these proceedings upon the case at bar is dropped.

On the other hand, Judge Carland, in his opinion, says:

> The settlement by the United States of the debt of the Central Pacific in 1899 can not be held to estop the United States from insisting at this time that the combination between the two roads is in violation of the antitrust act. It is not remarkable that in the proceedings resulting in the settlement so far as they appear of record the antitrust law was not referred to, as little attention was given in those days to the antitrust law of July 2, 1890 (2337).

It seems demonstrable that Judge Carland is right with respect to this defense: (1) The action taken by the Congress, the President, and the settlement commission, showed no intention to construe the antitrust act, or to grant any special indulgence or advance pardon to the Southern Pacific Company to violate it. (2) The commission, the President, and the Congress had no power under the Constitution to grant such an indulgence or advance pardon. (3) A construction put by these functionaries of the Government, either upon the antitrust act or upon the act under which the commission was appointed would not be binding upon this court or a guide to it. (4) No estoppel runs against the United States when it is seeklng as here to enforce the criminal law.

FIRST.

THE ACTION TAKEN BY THE CONGRESS, THE PRESIDENT, AND THE SETTLEMENT COMMISSION, SHOWED NO INTENTION TO CONSTRUE THE ANTITRUST ACT, OR TO GRANT ANY SPECIAL INDULGENCE OR ADVANCE PARDON TO THE SOUTHERN PACIFIC COMPANY TO VIOLATE IT.

The evidence shows that the action of Congress, the President, and the commission was directed toward securing for the United States as a creditor the payment of a debt due to it, and their action was confined to this.

(1) *No intention is disclosed to construe the antitrust act.*

There is not a word in the record that suggests any administrative construction of the antitrust act in this transaction. On the contrary, Attorney General Griggs, who was a member of the commission, and who conducted the negotiations for settlement, says:

> Unquestionably it is true that the legality of the transaction, so far as it might be affected by the Sherman antitrust act, was never considered or discussed with the commission or with the representatives of the Southern Pacific Railroad (1008).

It would be impossible to work out of this conduct any administrative interpretation of the Sherman antitrust act in the light of this testimony introduced by the defendants.

(2) *There was no intention to grant any special indulgence or advance pardon to the Southern Pacific Company to violate the Sherman Antitrust Act.*

The history of the settlement and of the investigations and legislation which led up to it shows that none of the officers of the United States were engaged in making a trade with the Southern Pacific Company by which they agreed either expressly or by implication that if the Southern Pacific Company would guarantee the debt of the Central Pacific Railroad the Southern Pacific Company might be permitted to have a special privilege to restrain trade in violation of the antitrust act.

None of these officers made any agreement, express or implied, that the Southern Pacific Company might buy the stock of the Central Pacific Railroad Company or retain control of that company.

The relation of the Central Pacific Railroad Company as a debtor to the United States for the amount of the principal and interest of bonds of the United States advanced to the Central Pacific Railroad Company under the act of 1864 received the attention of Congress during a number of years before a settlement of the debt was made.

In 1887 the Pacific Railway Commission was appointed and held lengthy hearings concerning this railroad and the other bond-aided railroads. Majority and minority reports were made to the President under date of December 1, 1887. The President submitted these reports to Congress on Janu-

ary 17, 1888. (Senate Executive Documents, first session Fiftieth Congress, 1887–88, vols. 2–6; D. Ex. 31, p. 1921.)

These reports dealt with the financial condition of the company, the methods of construction and operation and financing which had produced these conditions, and the methods to be adopted to secure payment of the debt.

They stated that the Central Pacific Railroad Company was no longer operating its railroad, but had leased it to the Southern Pacific Company and was dependent upon this lease for its income.

In February, 1890, a report was made to the Senate from the Committee on the President's Message. (D. Ex. 32; p. 1921, Senate Reports, first session Fifty-first Congress, 1889–90, vol. 1, report 893, p. 25.) This report said:

> It is manifest from the terms of their lease that any bill for the adjustment and settlement of the debt of the Central Pacific Company must, in order to be efficacious, contain provisions by which this lease and the obligations of the Southern Pacific Company under it shall become security to the United States, and that the consent of the Southern Pacific Company shall be obtained to such provisions of the bill.

The legislation recommended did not pass. Congress then was considering the prevention of restraints of trade and later in the year the Sherman Antitrust Act was enacted.

On July 16, 1894, a petition was filed, under the direction of the Attorney General, on behalf of the United States against the Southern Pacific Company and others in the Circuit Court of the United States for the Southern District of California (D. Ex. 96, p. 2279), alleging a restraint of trade. On August 4, 1894, before the entry of any appearance for the defendants and at the direction of the Attorney General, a decree was entered dismissing this petition without prejudice. (D. Ex. 96, p. 2293.) This was at the time of the great railroad strike.

On July 21, 1894, a report was made to the House of Representatives from the Committee on Pacific Railroads (Fifty-third Congress, second session, House of Representatives Report No. 1290) concerning the financial condition of the Central Pacific Railroad Company and the other bond-aided railroads. (D. Ex. 34, p. 1921.)

In January, 1895, a report was made to the Senate from the Committee on Pacific Railroads on the financial condition of the Central Pacific Railroad Company and the other bond-aided railroads. (D. Ex. 33, p. 1921, Fifty-third Congress, third session, Senate Report No. 830, p. 93.)

On April 14, 1896, a bill was introduced in the House of Representatives providing for a refunding mortgage. (D. Ex. 38, p. 1939.) The proposed legislation failed to pass. This apparently ended the attempts at legislation to require any guarantee from the Southern Pacific Company, or to recognize it, in the settlement.

On April 17, 1896, a bill was introduced in the Senate for the amendment of the original Pacific Railroad laws by the addition of provisions enabling the Central Pacific Railroad Company to issue a refunding mortgage and bonds. (D. Ex. 36, p. 1922; Fifty-fourth Congress, first session, Senate bill 2894.)

On May 1, 1896, the Committee on Pacific Railroads submitted to the Senate a report (D. Ex. 35, p. 1922, Fifty-fourth Congress, first session, Senate Report No. 778) on the same subject. This report stated that—

> The committee has, however, made in the case of the Central Pacific Railroad Company the special requirement that the lease of its properties to the Southern Pacific Company should be so modified as to provide as follows:
>
> First. That the Southern Pacific Company shall guarantee the payment, during the continuance of the lease, of the amounts payable under the bill.
>
> Second. That in case the Southern Pacific Company should consent to the termination of the lease before the maturity of all amounts payable under the bill it shall guarantee the payment of all such amounts thereafter to mature. * * *
>
> It is believed that the bill, in requiring payments of interest at the rate of 2 per cent per annum and payments on account of principal due from each company at the rate of $365,000 per annum (or $1,000 a day) for

> the first ten years, at the rate of $550,000 per annum (or upward of $1,500 a day) for the second ten years, and at the rate of $750,000 per annum (or upward of $2,000 a day) for the remainder of the term, will practically exhaust the reasonably anticipated earnings of the properties involved; that the security reserved to the United States under the bill has been carefully and adequately guarded, and that the provisions of the bill for payment of fixed sums at fixed dates, secured as therein prescribed, will practically insure the payment of the whole debt to the Government.

On April 25, 1896, a report was submitted to the House of Representatives from the Committee on Pacific Railroads. (D. Ex. 37, p. 1938; Fifty-fourth Congress, first session, House of Representatives Report No. 1497.) This was to somewhat the same effect as the report submitted in the Senate. The minority report stated that—

> All the California delegation, with one exception it is said, are a unit against any refunding which will vest both these roads, the Southern Pacific and the Central Pacific, in the same control; that is, in the present control. They contend that the case is within the principle that has given rise to the prohibition in the constitution and laws of so many States to any leasing or consolidation of parallel or competing lines, and within the principle of the antitrust law of Congress, and that in this instance the monopoly has exerted the oppression, for the preven-

tion of which the laws referred to were enacted. They suggest that either the Government, without actually operating the Central Pacific, maintain it as a sort of a railroad turnpike for the use of any or all other companies, or that the road be sold to purchasers of the Union Pacific or any other company that will afford competition with the Southern Pacific.

On January 8, 1897, Mr. Huntington, at request, sent to the chairman of the Railroad Committee of the Senate copies of the lease of the Central Pacific Railroad Company to the Southern Pacific Company dated February 17, 1885, and the modifications of January 1, 1888, December 7, 1893, and March 22, 1894, and these were presented in the Senate.

On January 13, 1897, a bill was introduced in the Senate (D. Ex. 44, p. 1963, Fifty-fourth Congress, second session, Senate bill 3522) to provide for the creation of a commission to be composed of the Secretary of the Treasury, the Secretary of the Interior, and the Attorney General, to settle the indebtedness of the bond-aided Pacific railroads.

On March 16, 1897, a bill was introduced in the Senate from the Committee on Pacific Railroads which provided for the creation of such a commission to arrange for a settlement of the debt to the Government growing out of the issue of bonds in aid of the Central Pacific Railroad and bond-aided railroads. (D. Ex. 40, p. 1957.)

On April 8, 1897, a report to accompany this bill was submitted to the Senate from the Committee on Pacific Railroads. (D. Ex. 39, p. 1956, Fifty-fifth Congress, first session, Senate Report No. 20.)

On July 12, 1897, a bill was introduced in the House of Representatives (D. Ex. 45, p. 1965, Fifty-fifth Congress, first session, House of Representatives bill 3750) to provide for the creation of such a commission.

On July 7, 1898, an act was passed (30 Stat., chap. 571, p. 659), which provided:

> That the Secretary of the Treasury, the Secretary of the Interior, and the Attorney General, and their successors in office be, and they are hereby, appointed a commission with full power to settle the indebtedness to the Government growing out of the issue of bonds in aid of the construction of the Central Pacific and Western Pacific bond-aided railroads, upon such terms and in such manner as may be agreed upon by them, or by a majority of them, and the owners of said railroads: *Provided*, That any and all settlements thus made shall be submitted in writing to the President for his approval or disapproval, and unless approved by him shall not be binding.
>
> That said commission shall not agree to accept a less sum in settlement of the amount due the United States than the full amount of the principal and interest and all amounts necessary to reimburse the United States for moneys paid for interest or otherwise: *And*

also provided, That said commission are hereby empowered to grant such time or times of payment by installment, and at such rates of interest, to be not less than three per centum per annum, payable semi-annually, and with such security as to said commission may seem expedient: *Provided, however*, That in any settlement that may be made the final payment and full discharge of said indebtedness shall not be postponed to exceed ten years and the whole amount, principal and interest, shall be paid in equal semiannual installments within the period so limited, and in any settlement made it shall be provided that if default shall be made in any payment of either principal or interest or any part thereof then the whole sum and all installments, principal and interest, shall immediately become due and payable, notwithstanding any other stipulation of said settlement: *Provided further*, That unless the settlement herein authorized be perfected within one year after the passage of this act the President of the United States shall at once proceed to foreclose all liens now held by the United States against said railroad companies and to collect the indebtedness herein sought to be settled, and nothing in this act contained shall be held to waive or release any right, lien, or cause of action already held by the United States.

Upon the enactment of this provision the Central Pacific Railroad Company was confronted with the alternative of making a settlement upon these

terms or of being subjected to foreclosure proceedings.

Its financial condition was such that it could reasonably expect to pay an adequate interest on refunding bonds to cover its debts. (Speyer, 1196, 1198.)

At some time between the passage of this act and February 1, 1899, Mr. Speyer presented orally to the President, or to the commission, a scheme for reorganization (1188). This scheme was that the Central Pacific Railroad Company, or a successor corporation, should issue a refunding mortgage to take the place of the existing mortgages and liens. In order to preserve the market values of the outstanding stock and bonds, it was necessary to find some way of getting rid of the Government debt. (Speyer, 1202.) It seemed to Mr. Speyer necessary to get some security which would be satisfactory to all the security holders, including the Government (1202). A guaranty of the refunding bonds by the Southern Pacific Company, or some other substantial guarantor, would increase the market value of these bonds (1202). He did not make any effort to interest any other railroad or other corporation (1200, 1182). In order to get the first-mortgage bondholders to take the new securities diluted by the increase in the amount of the mortgage required to provide for the Government lien, it was necessary to have the new bonds abundantly secured. In Mr. Speyer's judgment, in order to get

those bondholders to take the new bonds, it was necessary to have the guaranty of the Southern Pacific Company or some other adequate guaranty (1208). He presented the scheme to the President, originally in the form in which it finally went through (1203, 1205).

No one representing the Government requested the guaranty of the Southern Pacific Company, or requested the Southern Pacific Company to acquire the stock of the Central Pacific Railroad Company, or informed any representatives of either of the railroads that any breach of the Sherman antitrust law would be condoned. This was not discussed with the commission or considered by it (Griggs, 1008).

Mr. Griggs, then Attorney General, and Mr. Gage, then Secretary of the Treasury, testified that they understood that the bonds were to be guaranteed by the Southern Pacific Company. (Griggs, 999; Gage, 1011.) This guaranty was not of sufficient importance so that it was included in the agreement which was executed. The United States as a creditor had no interest in the question of who might acquire the capital stock of the Central Pacific Railroad Company or any other junior security, and it does not appear that any terms with respect to this were requested or even considered by anyone representing the United States.

Not only did the contract between the Central Pacific Railroad Company and the United States contain no agreement with the Southern Pacific Company to guarantee the new bonds of the Central

Pacific Railroad Company, but also no such guaranty was ever requested by the United States. It was introduced into the reorganization plan by the reorganizers because they believed it would facilitate their securing the cooperation of the first mortgage bondholders in the plan. Mr. Speyer says:

> (1208) In order to get the security holders who held some fifty-seven million dollars of bonds to take the new bonds, it was necessary to have those new bonds abundantly secured. In our judgment, in order to get those fifty-seven million dollars of bondholders to take these new refunding bonds it was necessary to have the guaranty of the Southern Pacific Company, or some other adequate guaranty; the reason being that the mortgage which they had was very considerably increased in amount by the bonds that went to the Government. If it had just been the question of extending the lien which they had, that probably could have been done without a guaranty; but the fact that the existing lien was so much increased in the bonds given to the Government, necessitated the guaranty of the Southern Pacific in order to make them good.
>
> That is, one of the effects of this arrangement was, if it is not too flippant a use of language, to let the Government down from the second story onto the ground floor, so far as security was concerned. And as to whether that had the effect of greatly increasing the securities with which the old security holders would have to pro rate in case of deficient assets.

> If it were not the Government, people would call it diluting them. I would say the security was diluted; but as long as the Government gets it, I do not use that word.
>
> I do not recall whether any of the three commissioners, the President, or Mr. Root suggested or required any substantial change in the plan which I originally proposed. I rather think that they did not, and that the plan, in its essential features, as I first presented it, was the one which went through (1208).

The agreement (*supra*, p. 52, answer, Exhibit A, p. 47) in substance provided that the United States would extend the time for payment of the amount due it in return for being given as security 59 per cent of the entire first mortgage in place of its existing second mortgage, and that $11,762,543.12 of the debt should be taken up by Speyer & Co. within one month.

This obligation of Speyer & Co. was in itself valuable. (Speyer, 1204.)

No agreement was made concerning the stock of the Central Pacific Railroad Company.

On February 20, 1899, the commissioners reported to the House of Representatives the settlement which had been made (P. Ex. 77, p. 1674), and submitted a copy of the agreement of February 1, 1899. This report described the terms of the agreement. Neither the agreement nor the report contained any reference to the fact that the refunding bonds were to be guaranteed by the Southern Pa-

cific Company, or to the fact that the Southern Pacific Company was to acquire the stock of the Central Pacific Railroad Company. The reorganization plan was never submitted to Congress.

March 3, 1899, Congress passed an act to authorize the Secretary of the Treasury to dispose of the notes or other evidence touching the indebtedness of the Central Pacific Railroad Company to the United States (30 Stat. c. 427, p. 1245), and this act said nothing whatever about any guaranty of the Southern Pacific Company, or about the stock of the Central Pacific Railroad Company.

On August 1, 1899, the refunding mortgages were executed by the Central Pacific Railway Company. (D. Ex. 27, p. 1788; D. Ex. 28, p. 1829.) They contained no reference to the fact that the refunding bonds were to be guaranteed by the Southern Pacific Company or that the Southern Pacific Company was to acquire the stock of the Central Pacific Railroad Company.

On the same day the Southern Pacific Company executed agreements subordinating the lease of the Central Pacific Railroad to the refunding mortgages. (D. Ex. 48, p. 1983; D. Ex. 49, p. 1987.)

On October 7, 1899, the bonds were delivered to the United States Treasury Department, and contained engraved on the back the guaranty of the Southern Pacific Company.

On November 30, 1899, the Attorney General, in his regular report to Congress, described the settlement which had been made, and in the course of the

description stated that the notes taken in settlement were guaranteed by the Southern Pacific Railroad Company (D. Ex. 53, p. 2240). In fact, they were not guaranteed by this company, but by the Southern Pacific Company.

The Commercial and Financial Chronicle during 1899 contained a number of references to the refunding scheme. (D. Ex. 95, p. 2258.)

The new notes held by the United States and secured by the refunding bonds were subsequently paid by the Central Pacific Railroad Company. (Van Deventer, 912–915.) The Southern Pacific Company acted as banker or disbursing agent (Van Deventer, 912), but the moneys used for the payment were derived from the sale of the new bonds of the Central Pacific Railway Company or from other of its resources, so that on the clearing of the accounts nothing went to the United States from the Southern Pacific Company in payment of this debt. (Van Deventer, 912, 913.) Debts due from the United States to the Southern Pacific Company were applied in part payment of this debt of the Central Pacific Railroad Company, and a corresponding amount was paid in accounting by the Central Pacific Railroad Company to the Southern Pacific Company. (Defendants' Answer, Exhibit "C", p. 73; Van Deventer, 904.)

On March 1, 1911, the Central Pacific Railway Company issued additional bonds for what is known as the "European loan," and they were guaranteed by the Southern Pacific Company.

There are bonds outstanding under these several mortgages.

Mr. Kruttschnitt has testified to the loss which would result to the Southern Pacific Company if these loans were called and the Southern Pacific Company was obliged to refund them. The figures are based on the assumption that the call was made in a high-money market, and that the Central Pacific Railroad Company as the principal debtor was unable to meet the obligation, or to reimburse the Southern Pacific Company. In making this computation he made no investigation to determine whether or not the assets of the Central Pacific Railway Company were adequate to meet all the bonds (822–824, 734, 755).

Mr. Kruttschnitt has testified that about 30 to 33 per cent of the dividends of the Southern Pacific stockholders come from the earnings of the Central Pacific Railroad (734). The dividends of the Central Pacific Railway Company since 1903 have been substantial and amount up to June 30, 1914, in the aggregate to $66,390,135, of which $22,015,630 was paid during the fiscal year ending June 30, 1914 (P. Ex. 41, p. 1638, 811, 1217).

It is difficult to imagine that Congress intended to grant the power of indulgence to the commission appointed to secure the settlement of the debt of the Central Pacific Railroad.

None of the legislation attempted from 1890 to 1899 provided for the purchase of the Central Pacific Railroad by the Southern Pacific Company.

The bills which sanctioned the lease were opposed on the ground that it tended to suppress competition and these bills failed to pass.

No legislation was passed at any time authorizing the commission to permit the Southern Pacific Company to acquire any of the stock of the Central Pacific Railroad Company.

At the time of the appointment of the commission the United States bore a dual relation to the Central Pacific Railroad Company—that of sovereign defender of the public welfare and that of creditor.

> *United States* v. *Union Pacific R. R. Co.*, 98 U. S. 569, 613.
> *Sinking Fund Cases*, 99 U. S. 700, 724, 751.

It was in its capacity as creditor that it appointed this commission as its business agent. There is nothing in the act of appointment which suggests any intention to confer upon the commission power either to enforce the criminal laws of the United States or to grant a pardon for the breach of them or indulgences to continue breaches of them in the future. The commission was given full power within its limited scope. The express limitations indicate that the scope was not broad. It was "to settle the indebtedness," "upon such terms and in such manner as may be agreed upon;" not to accept a less sum than the amount of the principal and interest of the debt; not to extend time at any rate of interest less than 3 per cent per annum, and to take

"such security as to said commission may seem expedient"; and not to postpone payment more than ten years, the extended payments to be in equal semiannual installments, all to become due on the default in payment of any, the President to proceed to foreclose the existing lien if a settlement was not perfected within one year. On the reading of the whole section it is apparent that the full power of the commission was to exercise a very limited power of attorney. It is not conceivable that Congress intended by this section to vest in this commission the extraordinary power to pardon breaches of the Sherman Antitrust Act and to grant indulgences to the Southern Pacific Company to continue such breaches for the long future.

The action of the commission has gained no additional force in support of the alleged defense of estoppel by any subsequent adoption. The United States Treasury received the notes of the Central Pacific Railroad Company for the payment of its debt and also received as collateral thereto the bonds of that company. The guaranty of these bonds by the Southern Pacific Company was not required by the written agreement negotiated by the commission. The report of the commission to Congress (P. Ex. 77, p. 1674) made no reference to this guaranty or to the fact that the Southern Pacific Company was to acquire the stock of the Central Pacific Railroad Company. It does not appear that Congress, or any member of it, ever knew or knows to-day that this stock was so acquired. The guaranty

if valid rendered the Southern Pacific Company responsible for the payment of the bonds. It was a matter of indifference thereafter whether the United States received payment from the Central Pacific Railroad Company or for account of that company from the Southern Pacific Company, or from other sources. On March 3, 1901, Congress determined that allowances should be made to the Southern Pacific Company and to the Central Pacific Railroad Company on certain pending claims and directed that these allowances should be made by crediting the amount upon the bonds of the Central Pacific Railroad Company, for the payment of which both companies had purported to obligate themselves. This indicated no intention on the part of Congress to approve the unreported acquisition of the stock in the Central Pacific Railroad Company by the Southern Pacific Company or to grant to these companies an indulgence not enjoyed by other citizens to continue to offend against the Sherman Antitrust Act. It indicated no intention to ratify any *ultra vires* act of the commission, if there was any such act. It is not to be assumed that the commission, the President, or the Congress, departed from the equal enforcement of the laws for the sake of getting payment of the private debt of an offender. There is nothing in the evidence to suggest that there has been any such departure.

Neither the act creating the commission nor the contract between the Central Pacific Railroad company and the United States negotiated by the com-

mission contains any reference to the Southern Pacific Company, and that company is not a party to the contract.

When the commission made the agreement of settlement in 1899, the Central Pacific Railroad Company owed the United States for principal and interest $58,812,715.48 and owed on other bonds $59,453,000, a total of $118,265,715.48. (Exhibit A of answer, p. 47.) The average annual net earnings of the company for the preceding 10½ years were $5,582,937.70, or a little more than 4½ per cent annually upon the bonded debt. There was nothing to indicate that the Central Pacific Railroad could not continue to earn at this rate. On the contrary, if it was independently owned, so that those in charge of its operation would not be actuated by the desire to divert as much freight as possible to the Southern Pacific Railroad, there was good reason to believe that its earnings could be increased materially. The United States as creditor could safely permit the debt to rest as it was on payment of the interest annually or could foreclose the lien by a sale at which the United States or others could purchase.

The agreement of settlement provided for the payment of the debt within 10 years with interest at the low rate of 3 per cent. By the agreement it was the United States, and not the Central Pacific Railroad Company, that was making concessions.

The improvement in the security consisted in changing the lien from a second mortgage to 59 per

cent of the first mortgage, and the immediate reduction of the debt to the extent of $11,762,543.12.

Apparently the advantages to the Southern Pacific Company of securing this extension of time and of preventing a sale to a competitor were so great that the Southern Pacific Company decided to undertake a large contingent obligation in order to secure the carrying out of the refunding scheme. It was no part of the agreement between the United States and the Central Pacific Railroad Company that the Southern Pacific Company should do this. The United States gave to the Central Pacific Railroad Company an option to substitute a new security or to suffer a foreclosure. The scheme was proposed in its entirety by the bankers (Speyer, 1201–1203), and was not requested by the commission.

It is evident that if immunity from prosecution for breach of the Sherman Antitrust Act had been a part of the agreement with the United States the contract of settlement would have provided for it. No such provisions are contained in the agreement, and the subject was not discussed. (Griggs, 1008.) No such assurances were given.

Neither the Southern Pacific Company nor the Central Pacific Railroad Company has paid to the United States anything for any such immunity. No more has been paid to the United States than the amount of the debt due to it or than the value of the security which it surrendered to purchasers of the bonds, whose money made the payment.

The large sums paid by the Southern Pacific Company for the stock of the Central Pacific Railroad Company were not expended at the bidding of the United States, and very likely they do not exceed the sums which other corporations have paid to perfect combinations in unreasonable restraint of trade. One of the evils attendant upon such combinations is that they pave the way for obtaining such returns from the dependent public that they invite initial investments far in excess of the intrinsic values obtained.

Doubtless some of these investments are made in reliance upon the chance that the indifference of public prosecutors or their ignorance of the existence of the combinations will furnish a practical immunity.

The making of the excessive payments therefore furnishes no evidence that the Southern Pacific Company was lured into a false sense of security by any action on the part of the commission.

On the contrary, the commission merely received the proposal of the bankers, uninvited, and made a contract for the settlement of the debt of the Central Pacific Railroad Company upon the terms laid down in the act under which the commission was appointed, and this contract did not authorize or purport to authorize the Southern Pacific Company to acquire the stock of the Central Pacific Railroad Company or to engage in operating the Central Pacific Railroad as lessee. The Southern Pacific Company was not a party to the agreement.

The right, denied by the law to all other corporations, to make combinations in restraint of trade is too important to be inferred when the contracting parties did not express it in their agreement. In the particular case the subject was not even discussed. (Griggs, 1008.)

Taking all the evidence at its best for the defendants, no officer of the United States agreed that the Southern Pacific Company might acquire the stock of the Central Pacific Railroad Company.

SECOND.

THE COMMISSION, THE PRESIDENT, AND THE CONGRESS HAD NO POWER UNDER THE CONSTITUTION TO GRANT SUCH AN INDULGENCE OR ADVANCE PARDON.

Of course, if the acquisition by the Southern Pacific Company of the stock of the Central Pacific Railroad Company, or any company owning the Central Pacific Railroad in February, 1899, did not constitute a restraint of trade, then the case for the petitioner fails and it becomes unnecessary to consider the effect of the action of the settlement commission, or the President, or the Congress in connection therewith.

If the acquisition of this stock by the Southern Pacific Company was a restraint of trade, then the action of the commission, the President, and the Congress, in order to have any effect in the case, must be taken in some way to be a grant of a special

privilege to the Southern Pacific Company to restrain trade and to continue to do so. This would mean that this company was granted the right to do that which would constitute a misdemeanor if done by anybody else. This would be a pardon in advance of the commission of the offense and an indulgence to commit crime.

It can require no very extended argument to establish that under a constitutional form of government such as ours no such special privilege can be granted by any department of the Government, executive, legislative, or judicial, or all acting together.

The pardoning power under article 2, section 2, of the Constitution, has its limitations, deducible to some extent from the general principles of that power as exercised by the King of England prior to the Revolution.

Ex parte Wells, 18 How. 307, 312.

The King himself could not pardon an offense before it was committed.

4 Hawkins' P. C. Bk., 2 ch. 37, sec. 28.

5 Chitty's Ed. of Burns' Justice, 2.

Although he might remit for the past, he could not in advance pardon the continuance of obstructions to the highway and the nuisance created by failing to remove them.

Coke's Third Institute, 237.

5 Chitty's Ed. of Burns' Justice, 2.

The continuing obstruction of a highway by physical means is analogous to the obstruction of a highway by the more refined method of destroying the competition which would make for its betterment.

The President himself could not grant an indulgence to continue to offend against the prohibitions of the Sherman Antitrust Act, even upon condition that the grantee should pay its debts to the United States.

THIRD.

A CONSTRUCTION PUT BY THESE FUNCTIONARIES OF THE GOVERNMENT, EITHER UPON THE ANTITRUST ACT, OR UPON THE ACT UNDER WHICH THE COMMISSION WAS APPOINTED, WOULD NOT BE BINDING UPON THIS COURT OR A GUIDE TO IT.

In the majority opinion Judge Hook says:

> The rule as to the persuasive force of an administrative construction of statutes is a familiar one and is frequently applied (2333).

This must refer to the familiar rule that this court in construing for the first time a statute under which the administrative departments of the Government have acted for a long time will take into consideration the unvarying construction previously put upon the statute by these administrative departments.

With the utmost respect it is submitted that this rule has no application whatever to the case at bar. The court must be referring either to the

construction of the act of July 7, 1898 (30 Stat. c. 571, pp. 571, 659), under which the commission was appointed, or to the antitrust act of July 2, 1890.

If the reference is to the act of July 7, 1898, there never has been any attempt by the commission to construe that act; the transaction was a single one; the act was plain on its face; it permitted the commission to negotiate a settlement of a single debt upon definite terms; and it contained no language susceptible of construction by anyone as permitting a restraint of trade. The action of the commission was confined to a single transaction. There has been no repetition of the same or similar action under the statute, and the case is devoid of any resemblance whatever to those announcing or applying the rule of administrative construction of acts of Congress.

If the reference of the court is to the antitrust act of July 2, 1890, the rule of administrative construction has no application, because that was not an act for administrative action or construction in any case. It was a general criminal law to be construed by the courts only. Before 1899 the Supreme Court had already announced the construction of that act in no uncertain terms, and in several cases, as applicable to interstate railroads, and as preventing restraints of trade. If the decision of the court below rests upon the action of the settlement commission in any degree, Judge Carland appears well justified in his statement in dissent that it is difficult to determine from the opinion of the majority exactly upon what ground or grounds the bill in this case is dismissed.

The Supreme Court of the United States in construing the antitrust act is not in need of assistance from the commission on the settlement of the Pacific Railroad debts, nor can such action be said to have "persuasive force," particularly when the guiding member of that commission, the Attorney General, testifies (Griggs, 1008) that the construction of that act was not considered.

In *United States* v. *Reading Company*, 226 Fed. 229 (D. C. Pa.), it was urged upon the court that one of the combinations complained of was made pursuant to a purchase at a receiver's sale ordered and approved by the court, but the court said:

> We do not know whether the act of 1890 was considered in its relation to the plan, and we approach the considerations of the present charges uninfluenced by the former action of the court (266).

In this respect certainly no greater effect should be given to the contract of the commission when it appears expressly that no such consideration was given by it to the act of 1890.

It has been held repeatedly that sanction from as important a governmental body as the legislature of any of the States does not save a combination which is in fact in restraint of trade, or assist to establish that it is not such a restraint.

> *United States* v. *Reading Co.*, 226 U. S. 324, 352, 357.
>
> *United States* v. *Union Pacific Railroad Co.*, 226 U. S. 61, 86.

Northern Securities Co. v. *United States*, 193 U. S. 197, 332.

United States v. *Delaware & Hudson Co.*, 213 U. S. 366.

Louisville & Nashville R. R. Co. v. *Kentucky*, 161 U. S. 677, 693 *semble*.

Philadelphia, Baltimore & Washington R. R. Co. v. *Schubert*, 224 U. S. 603.

U. S. v. *Reading Co.*, 226 Fed. 229, 266, *dictum*.

FOURTH.

NO ESTOPPEL RUNS AGAINST THE UNITED STATES WHEN IT IS SEEKING, AS HERE, TO ENFORCE THE CRIMINAL LAW.

An estoppel by conduct, if effective in such a case as this, produces the same result as an express grant of exemption from prosecution. To have an estoppel by the conduct of any officers of the Government, it is necessary to show that those officers were in a position where they could have made an express grant of such an exemption.

No officer of the United States has power to grant such an exemption.

It is a settled principle that no estoppel runs against the sovereign in the enforcement of the criminal laws.

Boyd v. *Alabama*, 94 U. S. 645.

Louisville & Nashville R. R. Co. v. *Kentucky*, 161 U. S. 677, 690.

United States v. *Willamette V. & C. M.*

Wagon-Road Co., 54 Fed. (C. C. Oregon), 807, 811, *dictum.*

Queen v. *Delme*, 10 Modern 199.

10 *Vin. Ab. Estoppel*, p. 433, *semble.*

Sheffield v. *Ratcliffe*, Hobart, p. 334a (1 Am. Ed. p. 501).

Bigelow on Estoppel, 6th Ed., p. 371.

Everest & Strode on Estoppel, 2d Ed., p. 8,

2 *Herman on Estoppel*, p. 1263.

Union Bridge Co. v. *United States*, 204 U.S. 364, 400, *semble.*

The United States when enforcing the criminal laws is proceeding for the common good, and not for a personal profit. No one in dealing with it should rely upon any supposition that it will disqualify itself to pursue the enforcement of the laws for the common good. If the agents of the sovereign attempt to do so it is apparent to everyone that they are exceeding their authority.

The sovereign in enforcing the criminal laws stands in a position entirely different from that occupied when acting contractually or in relation to its property. In these relations it may be bound by the acts of its agents within the scope of their authority. Instances of this kind are numerous. Many of them have been cited for the defendants. The decisions cited for them in this topic come all within this class.

Where a grant of property is dependent upon the character of the property and the determination of its character is to be made by a public official,

his determination in good faith, although erroneous, may be binding upon the United States.

Kihlberg v. *United States*, 97 U. S. 398.
Lytle v. *Arkansas*, 9 How. 314, 332.
United States v. *Bonness*, 125 Fed. (C. C. A. 8th) 485.
Michigan v. *Jackson*, 69 Fed. 116, 123.
Hough v. *Buchanan*, 27 Fed. 328.
United States v. *Willamette V. & C. M. Wagon-Road Co.*, 54 Fed. (C. C. Oregon) 807.
Cahn v. *Barnes*, 5 Fed. 326.
State v. *Milk*, 11 Fed. 389, 397, *dictum.*
Pengra v. *Munz*, 29 Fed. 830.
United States v. *McLaughlin*, 30 Fed. 147.
United States v. *Missouri R. R. Co.*, 37 Fed. 68.

The United States as a contractor may be bound by the decision of an engineer or arbitrator, rendered pursuant to prior agreement.

United States v. *Gleason*, 175 U. S. 588.
Judson v. *United States*, 120 Fed. (C. C. A. 2d) 637, 643.

The United States when dealing in commercial paper may be bound to some extent by the rules governing private individuals.

Cooke v. *United States*, 91 U. S. 389, 398, *dictum.*

But even this principle has only a limited application.

Hunter v. *United States*, 5 Peters, 173.
Carr v. *United States*, 98 U. S. 433, *semble.*

None of these principles has any bearing upon the liability of the United States to an estoppel against the enforcement of the criminal laws. When so acting it is its prerogative not to be bound by estoppel, and public policy demands that it should be free therefrom.

An express agreement by the authorized prosecuting officer of the Government, made in accordance with the long-established practice, not to prosecute an accomplice who testifies fairly against the chief alleged criminal does not prevent a subsequent prosecution of the accomplice.

Whiskey Cases, 99 U. S. 594.

Even the receipt and retention of money by the state, paid for the exercise of a right claimed under an unconstitutional statute, does not estop the state to set up the unconstitutionality of the statute when enforcing the criminal law, and this notwithstanding the fact that the statute had previously been enforced under a decision of the court of last resort.

Boyd v. *Alabama*, 94 U. S. 645.

The commission appointed to secure a settlement of the debt of the Central Pacific Railroad Company could grant no more rights by estoppel by its conduct than it could by express donation. The principle is the same as that which prevents the United States from being deprived indirectly, by adverse user, of lands donated for public uses only.

A railroad which is the recipient of such a grant can not be deprived of the lands by such adverse posses-

sion as ordinarily would produce that result, because this would accomplish by indirection that which the railroad could not do directly by sale.

Northern Pacific Railway Co. v. *Townsend*, 190 U. S. 267.

The fact that unreasonable restraints of competition by a company have been ignored, and that investments have been made in reliance thereon is not sufficient to raise a presumption that they are approved or to justify the Government in failing to enforce the laws and is no defense to such enforcement.

Louisville & Nashville R. R. Co. v. *Kentucky*, 161 U. S. 677, 690, 691.

The decision in the Union Pacific case is an illustration of this. The combination in that case was made in 1901. The petition for its dissolution was not filed for seven years, and the final decree was not entered for 12 years. The Government of the United States must have known of this combination at about the time it was made, for, so to speak, all the world knew of it.

FOURTH ASSIGNMENT.

The Central Pacific Railroad and the Southern Pacific Railroad were never, prior to February 20, 1899, a single railroad or system, but on the contrary were always two distinct railroads; (1) separately projected by separate and unrelated groups of men; (2) separately aided by gifts of public lands and loans of the public credit under acts of Congress to promote these two separate competitive systems of railroad between the Atlantic Ocean and the

Central United States on the east, and the Pacific Ocean on the west, and enacted prior to 1867 and before any person interested in the one railroad was interested in the other; (3) separately owned by separate corporations organized by separate groups of men; (4) separately constructed at the expense of and for these separate corporations; (5) separately leased by these separate corporations under separate leases, making the amount of rent dependent on the net earnings of the separate railroads; (6) separately controlled by boards of directors, some of whom were always diverse, and a majority of whom were diverse in all but five years between 1865 and 1899; and (7) separately stock owned, always to a substantial extent, and from 1883 to 1899 to the extent of more than a majority of the capital stock in each separate corporation, held by widely scattered stockholders in the United States and in Europe.

In the majority opinion Judge Hook says:

> Except as to corporate title and bookkeeping there were generally the aspects of a single enterprise. In this respect the conditions were not unlike those which have characterized the growth of many of the important railroad systems of the country in which, for necessity or convenience of financing and in some instances because of local laws, separate corporate organizations were utilized (2329).

n the minority opinion Judge Carland says:

> I do not think the evidence shows that the Central Pacific and the Southern Pacific were created originally and have always continued

to be one system. They have always been and are now operated as separate systems (2337).

The majority in analogizing the development of these two railroads through separate corporate organizations to the development of other railroads through the instrumentality of subsidiary corporations, overlook entirely a very vital distinction. The subsidiary corporations through which a single enterprise is carried out are the property of one holding company or of one group of men, so that the subsidiary company is merely an instrumentality which does not affect the ultimate beneficial property interests. In such a case there is no basis for competition between the different subsidiary companies. In the case of these two railroads, the Central Pacific and the Southern Pacific, there never was, prior to February, 1899, either in form or substance, any such identity of interest.

These two railroads did not have the village of Ogden, Utah, and the city of New Orleans as their terminals, with the cities of California and the Pacific coast as way stations. Neither was a branch or offshoot. Each was a main trunk line (Kruttschnitt, 774) constructed to be operated as a part of separate transcontinental railroads.

FIRST.

THE TWO RAILROADS WERE SEPARATELY PROJECTED BY SEPARATE AND UNRELATED GROUPS OF MEN.

The leading promoters of the Central Pacific Railroad were Leland Stanford, Collis P. Huntington,

Mark Hopkins, and Charles Crocker. Until after the main line of this railroad was completed in May, 1869, they had no interest whatever in the Southern Pacific Railroad Company. Until 1870 the latter company had no officers, directors, or stockholders, in common with the Central Pacific Railroad Company, or its promoters. (P. Ex. 14, p. 1318; P. Ex. 15, p. 1342; P. Ex. 16, p. 1414.)

The two projects had no relation to each other.

The Central Pacific Railroad Company was incorporated in 1861 to construct and operate a railroad from the Sacramento River to the eastern boundary of California. Its actual construction was begun and continued under the acts of Congress of 1862 and 1864 to provide for a railroad from San Francisco Bay to the Missouri River at Omaha and Council Bluffs.

As early as 1865 the project of two other transcontinental railroads which would be competitive with the Central Pacific Railroad had been publicly discussed, and the thirty-fifth and the thirty-second or thirty-third parallels of latitude had been considered for locations for these. (*Southern Pacific Company* v. *Horton*, 32 Fed. 457, 460.) It was to carry out these projects and not as feeder or ally of the Central Pacific Railroad that the Southern Pacific Railroad was organized.

Pursuant to this project, the Southern Pacific Railroad Company was incorporated December 2, 1865, by a group of men having no relation to the

Central Pacific Railroad, and for the purpose of constructing, owning, and maintaining a railroad from San Francisco Bay to San Diego, and thence to the eastern boundary of California, there to connect with a contemplated railroad from the eastern boundary of California to the Mississippi River. (P. Ex. 13, p. 1284.) The projected route to San Diego was through the Santa Clara and Pajaro Valleys, which would take it through Gilroy and Tres Pinos and thence by way of a pass through the coast range (*California* v. *Central Pacific Railroad Co.*, 127 U.S. 1 at 42), and to Alcalde near what is now Goshen (Hood 456; Kruttschnitt 799–800; D. Ex. 23, p. 1709), and down the San Joaquin Valley, and thence to San Diego, which was approximately at the thirty-second parallel of latitude.

Within eight months, on July 27, 1866 (14 Stat., c. 278, p. 292), Congress (P. Ex. 6, p. 1251) empowered the Atlantic & Pacific Railroad Company to construct a railroad near the thirty-fifth parallel of latitude from Springfield, Mo., to the Colorado River, and thence to the Pacific Ocean, and authorized the Southern Pacific Railroad to connect with the Atlantic & Pacific Railroad near the eastern boundary of California. This act gave to both railroads a subsidy of public lands.

On November 30, 1866, the Southern Pacific Railroad Company accepted this act (P. Ex. 75; p. 1672).

On January 3, 1867, the Southern Pacific Railroad Company filed a map in the Department of the Interior showing a route turning eastward before reaching San Diego and meeting the proposed line

of the Atlantic & Pacific Railroad at The Needles at the thirty-fifth parallel of latitude at the Colorado River.

On June 25, 1868 (15 Stat., c. 77, p. 79), Congress passed an act (P. Ex. 7, p. 1262) requiring the Southern Pacific Railroad Company to file with the Secretary of the Interior reports of its officers and stockholders and of other matters similar to those required of the Union Pacific Railroad Company and of the Central Pacific Railroad Company.

On April 4, 1870, the California Legislature passed an act (p. 883) to permit the Southern Pacific Railroad Company to change its route so that it need not pass through the town of San Diego before turning eastward.

On June 28, 1870, Congress passed a joint resolution to permit this change of route (16 Stat. 382).

All this had occurred before the Central Pacific Railroad Company, or any of its stockholders, directors, officers, or promotors had taken any part in the Southern Pacific Railroad project.

In 1870 there were these two separate well-developed projects—one for a railroad from San Francisco Bay to the Missouri River through the central part of the United States, approximately along the forty-first parallel of latitude, and the other for a railroad from San Francisco via the southern and southeastern part of the State, and thence to the Mississippi River, approximately along either the thirty-second or the thirty-fifth parallels of latitude.

Leland Stanford, the president of the Central Pacific Railroad Company, testified to the Pacific Railroad Commission in 1887:

> The construction of the Southern Pacific road was provided for by act of Congress, and its management went into the hands of people other than those who controlled the Central Pacific. It soon became apparent that the best interests of the Central Pacific required that the control of the Southern Pacific should be in the same hands, and that that road should work in perfect harmony with the Central Pacific. It became a necessity therefore that we should control the Southern Pacific, and when opportunity offered we availed ourselves of it and purchased the controlling interest in that road. Since then the roads have worked in entire harmony, with all the advantages of a pooling arrangement, and the advantages resulting from our system of leases (99).
>
> We early saw that if that line of railroad was completed—if it crossed the Sierra Nevada Mountains—all the valleys of the State would be open to it and it would be a very serious competitor of the Central Pacific. So we tried to control it, and we have succeeded in controlling it; and the consequence is that it has never been operated to the prejudice of the Central Pacific (99).
>
> Neither we ourselves, individually, nor any of the Central Pacific people are in any manner responsible for the building of the Southern Pacific line. I mean to say they had

> nothing to do with procuring the Government aid for the Southern Pacific. They had no interest in the Southern Pacific until long afterwards (100).

Mr. Huntington, the vice president of the Central Pacific Railroad, testified to a committee of Congress that the Southern Pacific was not built as a feeder to the Central Pacific Railroad (101).

The Southern Pacific Railroad was built without a year of interruption as a through trunk line (Kruttschnitt, 806, 774), designed primarily for transcontinental traffic. (D. Ex. 23, pp. 1717, 1719.)

The extension of the Southern Pacific Railroad south of the Tehachapi Mountains would not be undertaken as a feeder in any sense to the Central Pacific. (Chambers, 962.)

In September, 1874, Mr. Huntington as president of the Southern Pacific Railroad Company, made a report to the stockholders. It is significant that in this report nothing is said about any relation between this company and the Central Pacific Railroad Company, or its operations. On the contrary, the report is filled with statements indicating that the project was for a through transcontinental line. For instance:

> It is therefore safe to say that the company will receive, upon the completion of the road, the full amount of land covered by the grant (the Government land subsidy). The land agent of the company, after a careful examination and classification of the lands, places their value, at a low estimate, at $30,000,000;

and it is with much satisfaction that you can contemplate the ownership of this immense property, especially when you consider that its value to yourselves and the country has nearly all been created by your own energy and perseverance. (1718.)

As your board thought that it would be for the best interest of the company to build that portion of your road from Los Angeles via San Gorgonio to Fort Yuma, on the Colorado River, to secure the trade of Arizona and Sonora, before completing the road from the Tulare Valley to Los Angeles, they have built 50 miles on that division during the past year. But as this division is not connected with that portion of the road running out from San Francisco, and as it can hardly be said as yet to have been fully opened for general business, the earnings have been light and are not included in the preceding statement. (1716.)

The object of the new corporation was to construct, equip, maintain, and operate a line of railroad from the city of San Francisco to a point on the Colorado River, in the southeastern portion of the State, a distance of, say, six hundred and twenty-nine miles, with a branch from Tehachapi Pass to the Colorado River, at or near Fort Yuma, a distance of, say, three hundred and fifty-three miles. (1717.)

The general location of the Southern Pacific Railroad is peculiarly favorable for developing and controlling a large and remunerative miscellaneous business, for it occupies almost

> the only passes through which a railroad extending from San Francisco to the Colorado River can be built, and must therefore command the entire business between San Francisco and the southern portion of California, as well as northern Mexico and Arizona. At the Colorado River it will meet the Texas & Pacific Railroad, and when this connection is made it will give your road a direct communication by rail with all the southern and southwestern portions of the United States and the shortest line from San Francisco to New Orleans and the country bordering the Gulf of Mexico, over which you may look for much of the surplus grain from the southern half of California to pass on its way to the European market. (1719.)

April 3, 1871, a few months after Messrs. Stanford, Huntington, Hopkins, and Crocker had become interested in the Southern Pacific Railroad Company, that company accepted the Texas Pacific act (P. Ex. 76, p. 1673) and filed in the Department of the Interior its map showing the continuation of its route from Tehachapi Pass by way of Los Angeles, to its junction with the proposed Texas & Pacific Railroad at the Colorado River near Yuma, Ariz., approximately at the thirty-second parallel of latitude. (*U. S.* v. *Southern Pacific Railroad Co.*, 146 U. S. 570, 572, 574; *Southern Pacific Railroad Co.* v. *U. S.* 189 U. S. 447, 449.)

This completed the defining of the intention of the Southern Pacific Railroad Company to connect with

both of the through routes, that via the thirty-fifth parallel of latitude and that via the thirty-second parallel of latitude, in accordance with the project for which it had been organized in 1865.

In 1869 the building of this southern line had progressed to Gilroy. In 1871 it was advanced to Pajaro. (1640; D. Ex. 23, p. 1709.) In 1872 it was continued from Goshen, at the end of the Central Pacific Railroad, and because it was necessary to build 20 miles immediately in order to save the franchise. (Strobridge, 402, 414.)

The stretch from Tres Pinos to Alcade has never been completed. Instead, the coast line has been built from Gilroy (Sproule, 223) down the coast to Los Angeles and thence to the thirty-second parallel of latitude, as originally projected at Yuma, and this now forms the chief freight route of the Southern Pacific Railroad from San Francisco Bay to El Paso, Galveston, and New Orleans. (Sproule, 223.)

From 1865, when the Southern Pacific Railroad Company was incorporated, to 1883, when it had a line near the thirty-second parallel of latitude and connected through to New Orleans, and had also its junction with the Atlantic & Pacific Railroad at The Needles, at the thirty-fifth parallel of latitude, on the Colorado River, there was not a year of cessation in the building of this as a through southern line (Kruttschnitt, 806), substantially as projected in 1865.

The separate character of the project as a through line was never lost.

SECOND.

THE TWO RAILROADS WERE SEPARATELY AIDED BY GIFTS OF PUBLIC LANDS AND LOANS OF THE PUBLIC CREDIT UNDER ACTS OF CONGRESS TO PROMOTE THESE TWO SEPARATE, COMPETITIVE SYSTEMS OF RAILROAD BETWEEN THE ATLANTIC OCEAN AND THE CENTRAL UNITED STATES ON THE EAST, AND THE PACIFIC OCEAN ON THE WEST, AND ENACTED PRIOR TO 1867, AND BEFORE ANY PERSON INTERESTED IN THE ONE RAILROAD WAS INTERESTED IN THE OTHER.

July 1, 1862 (P. Ex. 2, p. 1223), Congress by an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," incorporated the Union Pacific Railroad Company, to construct a railroad near the forty-first parallel of latitude from the Missouri River (1231, 1233) to the western boundary of Nevada (1229) to connect with the railroad to be built by the Central Pacific Railroad Company of California (1229, 1230).

This act authorized the Central Pacific Railroad Company to construct a railroad from the Pacific coast near San Francisco to the eastern boundary of California, and thence to a connection with the Union Pacific Railroad (1231).

This act granted to these two railroads a subsidy of 10 square miles of public lands for each linear mile of railroad, and also bonds of the United States to the amount of $16,000 for each ordinary mile,

$32,000 for each mile in the less mountainous country, and $48,000 for each mile in the mountainous country (1232).

October 7, 1862, the Central Pacific Railroad Company accepted this act. (P. Ex. 59, p. 1655.) June 23, 1863, the Union Pacific Railroad Company accepted it. (P. Ex. 60, p. 1658.)

July 2, 1864, Congress amended this act (P. Ex. 3, p. 1236), to permit these railroads to issue first-mortgage bonds to an amount equal to the bonds to be advanced by the United States and also doubled the land subsidy.

In this way Congress provided an enormous subsidy for a railroad from San Francisco Bay to the Missouri River near the forty-first parallel of latitude.

On July 27, 1866 (P. Ex. 6, p. 1251), Congress passed the act referred to in the preceding section, giving the Southern Pacific Railroad Company a subsidy for another railroad to run in competition with the first, from San Francisco Bay southerly to the thirty-fifth parallel of latitude, and thence to the Mississippi River.

Under the first subsidy the Central Pacific Railroad was constructed. Under the second subsidy the Southern Pacific Railroad was constructed.

The first was constructed before anyone had a common interest in the two. The subsidy was granted to the second, it had been accepted by the second, and the construction had proceeded as far

as Gilroy before anyone interested in the first railroad had any interest in the second.

The manifest purpose of Congress was to promote two competitive lines from the Pacific Ocean to the eastern part of the country. The importance of this competition in the judgment of Congress is shown again in its action in 1871.

On March 3, 1871 (16 Stat., c. 122, p. 573), Congress passed an act (P. Ex. 9, p. 1265) to incorporate the Texas-Pacific Railroad Company to construct a railroad near the thirty-second parallel of latitude from Marshall, Tex., to El Paso, and thence to the Pacific Ocean at San Diego, and to connect on the east with the New Orleans, Baton Rouge & Vicksburg Railroad, and to authorize the Southern Pacific Railroad Company to extend a line from Tehachapi Pass in California to a junction with this Texas-Pacific Railroad at the Colorado River at the eastern boundary of California. Tehachapi was between Bakersfield and Mojave on the projected line of the Southern Pacific Railroad to its junction with the Atlantic & Pacific Railroad at The Needles on the Colorado River.

This act gave both the Texas-Pacific Railroad Company and the Southern Pacific Railroad Company a subsidy of public lands (1268, 1273).

This act provided that the Texas-Pacific Railroad might consolidate with other roads, but it expressly provided that "no consolidation shall be

with any competing through line of railroads to the Pacific Ocean" (1267).

The defendants presented below the somewhat startling argument that as this limitation upon consolidation was confined to the Texas-Pacific Railroad it manifested an intention on the part of Congress to permit the Southern Pacific Railroad to consolidate even with a competing line. Certainly this is not an inference naturally to be drawn. No reason is assigned for permitting to the Southern Pacific Railroad the privilege of consolidating with competing lines when this was denied to other Government-aided railroads. The reason why the Texas-Pacific Railroad is the only one mentioned in the proviso is obvious. Unless it is expressly sanctioned by general or special legislation, railroads do not have the right to consolidate with each other. No right to consolidate was granted to the Southern Pacific Railroad Company in the Texas-Pacific Railroad act, and therefore there was no grant which required a qualification. The act made an express grant to the Texas-Pacific Railroad Company of the right to consolidate, and out of abundant caution the proviso was added that this consolidation should not be with a competing line.

The rights to consolidate given by the acts of 1862 and 1864 to the Union Pacific Railroad Company and the Central Pacific Railroad Company were extended only to the corporations named in the act. In the Atlantic & Pacific act of 1866 no right to consolidate was given. Therefore it was not

necessary to include in these two acts an express proviso prohibiting consolidation with competing lines. It was only when the more general right of consolidation was given to the Texas-Pacific Railroad Company that it became necessary out of abundant caution to insert the proviso.

It is not likely that Congress intended to leave open the way for the competing Central Pacific and Southern Pacific Railroads to combine with each other while expressly prohibiting the other competing line to do so.

Out of this legislation have developed (1) the Central Pacific-Union Pacific over the original line; (2) the Atchison, Topeka & Santa Fe Railroad in part over the line of the Atlantic & Pacific Railroad; and (3) the Southern Pacific Railroad with its extensions through Texas and Louisiana.

It is believed that the history of railroad legislation in this country would be searched in vain to find a more emphatic illustration of railroads separately projected, created, and aided by the Government to be separate and competing lines.

THIRD.

THESE TWO RAILROADS WERE SEPARATELY OWNED BY SEPARATE CORPORATIONS ORGANIZED BY SEPARATE GROUPS OF MEN.

The Central Pacific Railroad was owned from its inception until 1899 by the Central Pacific Railroad Company, and a part by the Western Pacific Railroad

Company, which was consolidated into the Central Pacific Railroad Company in 1870 (1280).

The Southern Pacific Railroad has been owned since its inception by the Southern Pacific Railroad Company. It had a separate corporate organization in California, Arizona, New Mexico, Texas, and Louisana. These, however, were in the true sense subsidiary companies in that there was an identity of interest and ownership throughout the line from San Francisco Bay to New Orleans, and thence by steamer to New York.

Nobody connected with the Central Pacific Railroad Company had anything to do with the organization of the Southern Pacific Railroad Company. (P. Ex. 14, p. 1316; P. Ex. 15, p. 1342; P. Ex. 16, p. 1414; First Section, *supra*, p. 198.)

FOURTH.

THESE TWO RAILROADS WERE SEPARATELY CONSTRUCTED AT THE EXPENSE OF AND FOR THESE SEPARATE CORPORATIONS.

The defendants have introduced testimony to show that the construction men who worked on one of these roads also work on the other. Instead of showing a unity of action, it shows just the reverse.

The Central Pacific Railroad was constructed for a short distance by Charles Crocker & Co. With this exception, it was constructed by the Contract & Finance Co., which was a construction company, all the stock in which was owned by Stanford, Hunting-

ton, Hopkins, and Crocker in equal parts. By this device, if there were any construction profits, they did not become subject to the bonded or other debts of the railroad company, or inure to the benefit of the other stockholders in the company. This was a source of complaint from these other stockholders. (Pratt, 524; Pacific Railway Commission Report, p. 73; D. Ex. 31, p. 1921.)

These four men, Stanford, Huntington, Hopkins, and Crocker, were stockholders but by no means the only stockholders in the Central Pacific Railroad Company during the course of its construction (*infra*, p. 221).

The construction was carried out for the Central Pacific Railroad Company and at its expense. The funds for this were provided by first mortgage bonds and the Government subsidy. These together provided $32,000 for every ordinary mile, $64,000 for every mile in the less mountainous country, and $96,000 for every mile in the mountainous country.

The main line of the Central Pacific Railroad was completed in 1869. (P. Ex. 42, p. 1638.) The branch south to Goshen was completed in 1872 (1639). The branch north to Redding was completed the same year (1639). This branch was completed from Redding to the northern boundary of California in 1887 (1638). The line from Hazen, Nev., to Mojave, Calif., was constructed between 1881 and 1910 (1639). The line in Oregon was constructed between 1906 and 1912 (1639.) The branch from Derby Junction, Nev.,

northerly to Susanville was constructed between 1904 and 1913 (1639).

The Southern Pacific Railroad had been constructed from California as far south as Gilroy on March 13, 1869 (1640). Stanford, Huntington, Hopkins, and Crocker first became connected with this company in 1870. This railroad was completed to the Colorado River opposite Yuma, Ariz., September 13, 1877 (1640), and to El Paso, Tex., in April, 1881 (1640). The Galveston, Harrisburg & San Antonio Railroad from El Paso to connections with railroads to New Orleans was completed in 1883. The line from Mojave to a junction with the Atlantic & Pacific Railroad at The Needles, at the eastern boundary of California on the Colorado River, was completed July 1, 1883. The line north to Tehama, Calif., was completed in 1882 (1641). That from the southern boundary of Oregon to Portland was completed in 1887 (1644).

From 1870 the Southern Pacific Railroad was constructed by construction companies, the stock in which was owned by Stanford, Huntington, Hopkins, and Crocker. At first the construction was carried out by the same Contract & Finance Co. that had built the Central Pacific Railroad. It was succeeded at some time by the Pacific Improvement Co., and later by the Western Development Co. and by the Southern Development Co. (Hood, 433, 445, 447, 454; Strobridge, 399, 403, 404, 405, 411, 412; Martin, 420, 423; Pratt, 483, 504, 510, 522; Foulds, 588; Redington, 553; Hopkins, 684.)

The construction work was done for each railroad corporation and at its expense.

The construction engineers of the two railroad companies were transferred from one company to the other as the construction was being performed for the one company or the other. (Hood 434, 437, 448.) The two railroad corporations and the several construction corporations were kept distinct. The Central Pacific Railroad Company acted as the banker or clearing house for the construction companies. (Strobridge, 406; Hopkins, 652, 684; Martin, 423; Hood, 436, 449.)

Mr. Redington was in the paymaster's office of the Central Pacific Railroad. He would figure out the pay rolls of the railroad and would obtain from the construction company the pay rolls of the construction company. He would take the pay car and pay the railroad company's men to the end of the line, and would pay the construction company's men beyond the line. He would on his return determine how much he had paid for each company, and would obtain from the construction company a draft for the amount which he had paid for the construction company in return for the money of the railroad company which had been used in making payment. (Redington 554.)

The majority opinion below says:

> Except as to corporate title and bookkeeping there were generally the aspects of a single enterprise (2329).

This comment leaves entirely out of consideration the fact that this bookkeeping affected the actual moneys in the treasury of the one corporation or the other, and the cost of the railroads to the one corporation and the other. The charges were not for convenience in determining for accounting purposes what was the cost of any particular line of railroad. They were charges which were met from the separate funds of two separate corporations. The different stockholders (*infra*, p. 221) in the two corporations were the ones whose financial interests were affected by the way in which the expense of this work was borne.

These charges were kept separate for the express purpose of preventing one corporation from paying for any part of the expense of the construction of the railroad of the other corporation.

The fact that a single construction company built the whole or parts of the two railroads, and that that construction company was owned by directors and large stockholders in these two railroad companies is of no importance in determining whether or not the railroads were separately constructed for and at the expense of the separate corporations. The evidence introduced by the defendants shows that they were so separately constructed and that care was taken to see that no part of the expense of construction of one of them was charged to the other.

FIFTH.

THESE TWO RAILROADS WERE SEPARATELY LEASED BY THESE SEPARATE CORPORATIONS UNDER SEPARATE LEASES, MAKING THE AMOUNT OF RENT DEPENDENT ON THE NET EARNINGS OF THE SEPARATE RAILROADS.

Until April 1, 1885, the Central Pacific Railroad Company operated its own railroad as an owner.

Until March 1, 1885, the Southern Pacific Railroad Company operated the so-called northern division of its railroad, a part of what is now its coast line, as an owner. The Central Pacific Railroad Company never had anything to do with this northern division. (Richardson, 639; Donaldson, 628; Hopkins, 651; Martin, 429; Hood, 456; Redington, 564; Railton, 569, 577; Klink, 600, 609; Englebright, 472.)

From 1872, until March 1, 1885, the Southern Pacific Railroad Company, pending the completion of its through line, temporarily (D. Ex. 23, p. 1712) leased its lines of railroad south of Goshen to the Central Pacific Railroad Company, and the latter company operated them as a lessee. (Pratt, 523; Hopkins, 685; D. Ex. 24, p. 1758–1768.) There was nothing to differentiate the operation by the Central Pacific Railroad Company under these leases from the operation of a leased line by any company. These operations were conducted in the manner customary with leased railroads. (Pratt, 523; Hopkins, 685; Redington, 565; Foulds, 586; Klink, 612.)

The portions of railroad belonging to the Southern Pacific Railroad Company were advertised by the Central Pacific Railroad Company as "leased lines." (D. Ex. 8, p. 1677; D. Ex. 9, p. 1678; D. Ex. 10, p. 1679; D. Ex. 14, p. 1681; D. Ex. 16, p. 1682; D. Ex. 18, p. 1682; D. Ex. 19, p. 1683.) Trains were run without interruption over the lines of the operating company and over the lines of which it was lessee. (Breckenfeld, 458; Englebright, 466; Foulds, 582; Donaldson, 626; Luckett, 533; Railton, 575; Horsburgh, 630.) Rolling stock and supplies were made and repaired in the shops of the lessee company. (Martin, 421; Luckett, 533, 534; Railton, 576.) They were charged to the particular company for which they were provided. (Slater, 528, 530; Luckett, 536, 537; Klink, 606.) The rolling stock was used on the lines owned and on the lines leased. (Luckett, 534, 535; Johnson, 548; Railton, 577; Englebright, 467; Pratt, 506; Sheedy, 593; Kruttschnitt 710.) The operations were separately accounted for and settled between the two companies. (Luckett, 537; Redington, 565; Slater, 529; Klink, 603, 605, 606, 607, 610, 611, 612; Hopkins, 685.)

Messrs. Stanford, Huntington, Hopkins, and Crocker were officials of the Central Pacific Railroad Company from the beginning, and were officials of the Southern Pacific Railroad Company from 1870, and were recognized by all the subordinate officials as having authority. (Railton, 578; Foulds, 585; Horsburgh, 632.) When action by the stockholders

or directors as a board was necessary, it was taken. (Foulds, 586.)

In 1885, on the formation of the Southern Pacific Company, the Central Pacific Railroad Company made one lease of its railroad to the Southern Pacific Company, and the Southern Pacific Railroad Company made another lease of its railroad to the Southern Pacific Company.

These two leases were made on different dates. They were for terms beginning on different dates. The covenants and conditions of the two leases were different. (Klink, 610; Breckenfeld, 461; Englebright, 473; Pratt, 491.)

The lease from the Southern Pacific Railroad Company to the Southern Pacific Company was of lesser importance, because at this time the Southern Pacific Company owned all the stock in the Southern Pacific Railroad Company. The Southern Pacific Company owned none of the stock in the Central Pacific Railroad Company before 1899. This distinction was the reason for the separate lease of the Central Pacific Railroad. (Hopkins, 688.)

The lease of the Central Pacific Railroad required the Southern Pacific Company to pay a rental of $1,200,000 per year, and in addition the net earnings of the Central Pacific Railroad not exceeding $2,400,000 per year. Evidently, this provision of the lease required the Southern Pacific Company to operate the Central Pacific Railroad in such a manner as to yield as large a net income as possible for the

benefit of the Central Pacific Railroad Company and its stockholders. If the lease had been valid and its legal requirements complied with the Southern Pacific Company would have been obliged, in operating under it, to compete against the Southern Pacific Railroad so as to earn and pay as much of this contingent rental as possible.

The lease contained elaborate provisions for accounting between the lessee and the lessor, and required the lessee to maintain the roadbed, equipment, and other property of the lessor's railroad. It required the lessee company to account for any use on any of its other lines, of any rolling stock or other personal property of the lessor in the manner customary with railroads using foreign equipment (18). It charged the lessor company with any of the lessee's equipment used on the lessor's lines.

Accounts in the manner required by the lease were kept between the two companies. Equipment built was lettered to designate to which company it belonged. All the operations were conducted in the manner which is common where one railroad is leased to another.

It does not appear that there was lacking any element of that degree of separation which is to be expected where two separately owned railroads are operated by one company as an owner of one of the railroads and as the lessee of the other. (Hopkins, 685.)

SIXTH.

THESE TWO CORPORATIONS WERE SEPARATELY CONTROLLED BY BOARDS OF DIRECTORS, SOME OF WHOM WERE ALWAYS DIVERSE, AND A MAJORITY OF WHOM WERE DIVERSE IN ALL BUT FIVE YEARS BETWEEN 1865 AND 1899.

There were no common directors of these two corporations before 1870. In every year from the beginning to 1899, with the exception of the years 1876 and 1883 to 1887, a majority of the directors of the two corporations were diverse. In 1895, 1896, and 1897 the two corporations had only one director in common. In 1894, 1898, and 1899 they had no directors in common. (P. Ex. 14, p. 1316; Pratt, 497, 498.)

SEVENTH.

THESE TWO CORPORATIONS WERE SEPARATELY STOCK-OWNED ALWAYS TO A SUBSTANTIAL EXTENT, AND FROM 1883 TO 1899 TO THE EXTENT OF MORE THAN A MAJORITY OF THE CAPITAL STOCK IN EACH CORPORATION HELD BY WIDELY SCATTERED STOCKHOLDERS IN THE UNITED STATES AND IN EUROPE.

These two railroads were separately owned, whether we look at the corporate entities only, or at the stockholders or bondholders behind them.

In the testimony and in the briefs for the defendants will be found constant references to these two railroads as a single system, which the petitioner is seeking to make for the first time into two rail-

roads. There is no foundation whatever for such a contention. These two railroads were the separate properties of two separate and unrelated corporations—the Central Pacific Railroad Company and the Southern Pacific Railroad Company. Neither railroad was the individual property of Stanford, Huntington, Hopkins, and Crocker.

The Central Pacific Railroad was not built with the money of these four men. It was built with the proceeds of the first mortgage bonds and of the bonds loaned to the Central Pacific Railroad Company by the United States. There is no reason to believe that the proceeds of these bonds were not sufficient to pay for the construction of the entire railroad. These two issues of bonds were for $32,000 per ordinary mile, $64,000 per less mountainous mile, and $96,000 per mountainous mile. There is nothing in the record to indicate that this was not an abundant amount to pay for the construction and equipment of the railroad, or that the four promoters made any financial contribution to it. On the contrary, apparently they received all the stock which they ever held in the company as a profit. (D. Ex. 31, p. 1921; Pacific Railway Commission Report, pp. 23, 88, 107, 75, 82, 69–82.) The estimated cost of reproduction of the 850 miles of bond-aided railroad was less than $51,000,000. (P. R. C. Rept., p. 23.)

When it was sought to hold the estate of Mr. Stanford for the obligations of the Central Pacific Railroad, the distinction between the corporation

and the four promoters was made very clear, and it was held that they did not assume the obligations of owners. (*U. S.* v. *Stanford*, 161 U. S. 412, 70 Fed. 346; 69 Fed. 25, 44.) They were not the owners of the railroad. They possessed no franchises. In 1899, in a very substantial sense, the holders of the first-mortgage bonds and the United States Government, to whom together there was owed approximately $117,000,000, were much more nearly the owners of this railroad than were Stanford, Huntington, Hopkins, and Crocker.

However, in the legal sense, and in the substantial sense, the owner of this railroad was the Central Pacific Railroad Company, and the stock in that company was always owned by different men from those who owned the stock in the Southern Pacific Railroad Company and in the Southern Pacific Company.

Stanford, Huntington, Hopkins, and Crocker acquired a controlling interest in the stock of the Southern Pacific Railroad Company in 1870. It does not appear when they acquired the balance of the stock in that company, but it was at some time before 1884. (P. Ex. 16, p. 1414.) In 1884 they owned all the stock in the Southern Pacific Railroad Company. (Hopkins, 672.)

In 1876 Mr. Huntington wrote that the Central Pacific "does not control the Southern Pacific" (101). In 1877 he wrote that "the Southern Pacific is a separate and distinct property" (101).

When the Southern Pacific Company was organized in 1884 these four interests acquired all the stock in that company, and that company acquired all the stock of the Southern Pacific Railroad Company, but none of the stock of the Central Pacific Railroad Company. (Klink, 621.) The Southern Pacific Company acquired no stock in the Central Pacific Company at any time before 1899.

The ownership of the stock in the Central Pacific Railroad Company may be considered conveniently in three separate periods—the first from 1861 to 1877, the second from 1877 to 1884, and the third from 1884 to 1899.

In the first period Stanford, Huntington, Hopkins, and Crocker probably owned, directly or indirectly, a large part of the stock. They never owned it all. In the second period they were disposing of their stock, and so holding a constantly diminishing amount. In the third period they held less than a majority of the stock, and the stock was widely distributed throughout the United States and in Europe.

The stock books of the Central Pacific Railroad Company are not in evidence because the defendants state that the books have been destroyed by fire. (Jackson, 648.)

From the reports filed by the Central Pacific Railroad Company with the Secretary of the Treasury and with the Secretary of the Interior (P. Ex. 15, pp. 1342–1413) and with the California Railroad Commission (871) it appears that the num-

ber of stockholders in this company in different years was as follows:

1863	271	1882	1,880
1864	296	1883	2,198
1865	319	1884	2,600
1866	312	1885	2,237
1867	325	1886	1,916
1868	330	1887	1,826
1869	340	1888	1,796
1870	190	1889. Number not shown.	
1871	140	1890	1,703
1872	130	1891	1,700
1873	85	1892	1,700
1874	90	1893	1,681
1875	90	1894	1,713
1876	90	1895	1,651
1877	89	1896	1,630
1878	82	1897	1,617
1879. No report found.		1898	1,427
1880	411	1899	480
1881	1,340	1900	16

Some of the counties of California were among these stockholders. (P. Ex. 15, pp. 1385, 1402.)

In certain years the reports showed the number of the stockholders resident in California and the par value of their holdings as follows (871):

Year.	Number of stockholders.	Holdings.
1877	62	$43,256,300
1878	56	43,260,000
1880	46	25,672,000
1881	48	18,272,800

During these years Mr. Huntington was a resident of New York, and Mr. Stanford, Mr. Crocker, and Mr. Hopkins and his representatives after his death were residents of California.

These four men, when they sold their stock in the Central Pacific Railroad Company, did so on joint account. (Davis 132, Schwerin 675.)

From these reports of the stock held in California it would appear that they disposed of over 60 per cent of their holdings between 1877 and 1881.

On March 12, 1878, Mr. Richard S. Spofford, on behalf of the Southern Pacific Railroad, said to the Committee on Railroads of the United States Senate (509):

> It is affirmed respecting those by whose labor and enterprise the Southern Pacific Railroad of California has been extended to its present terminus to Fort Yuma that but few of their number are connected, whether by ownership or otherwise, with the Central Pacific Company—so few, indeed, as to constitute but one-seventh in ownership and control of the former corporation, and this is an assertion which is capable, it would seem, of absolute authentication.

Mr. Pratt, who testified as to the authority exercised by Messrs. Stanford, Huntington, Hopkins, and Crocker, was ignorant as to the amount of stock which these men held (498, 502, 503, 510, 511, 514).

Mr. Sproule, president of the Southern Pacific Company, testified that he first joined the Central Pacific Railroad in 1882, and that he understood that considerable blocks of the stock were then held in Europe. (Sproule, 217.)

Mr. Speyer testified that Speyer & Co. had been the bankers for Mr. Huntington and that they sold a block of Central Pacific shares for him in Europe before 1884 (1191); that it was certainly during the dividend-paying period that the great bulk of the stock was sold in England and Holland (1196); that he thought the stock sold at about 50, and that it declined to 36 or something like that in 1883, and was selling considerably below the price at which it had been sold (1196); that the sales in England were, he should think, before 1884, possibly in 1881 (1194); that when he first came to the New York office of Speyer & Co. in 1883, 1884, or 1885 the stock of the Central Pacific Railroad Company was then held largely in England and Holland; that he could not remember whether a majority of the stock was so held (1191). The period of substantial dividends ended January 15, 1884. (P. Ex. 41, p. 1637.)

Frank H. Davis, who was in the service of Mr. Huntington from February 1, 1881, to July 1, 1901, testified that he opened a set of books for Mr. Huntington probably before 1885, and that he entered therein the different investments held by Mr. Huntington (131), and that he recalled that Mr. Huntington then did not have very many shares in the Central Pacific Railroad Company (133), and that he knew that there were stockholders in Europe in 1885 (132); that there had been before that time (132), and that stock was being sold in 1881 through brokers (132) for Mr. Stanford, Mr. Huntington, Mr. Hopkins, and Mr. Crocker.

Mr. Klink, clerk in the general auditor's office from 1883 to 1887 and in the office of the secretary and comptroller from 1887 to 1895 (598), testified that he was familiar with the number of stockholders in the company during these years; that the numbers in the reports corresponded with his recollection (613), and that by 1884 large quantities of the stock in the Central Pacific Railroad Company had become widely distributed in America and in Europe—England and on the Continent (664); that the greater part of the stock stood on the books in the names of office employees of the company, who were not themselves the real owners of the stock (614); that the stock was dealt with on the stock exchanges in 1883 (615); that the stock standing in 1884 in the names of Mr. Huntington, Mr. Stanford, Mr. Crocker, and the Hopkins estate was considerably less than a majority of the stock in the company (618); that it was his impression that the stock standing in the names of these four in 1884 was comparatively small (618); that the voting control remained in the hands of 15 or 20 of the employees of the company (618); that he had no knowledge whether stock in their names had been sold in Europe (619); and that the remaining stock held by upwards of 2,500 shareholders was in scattered holdings among the public (618).

Mr. Jackson, present assistant chief clerk in the president's office of the Southern Pacific Company (640), and in the office of the secretary of the Central Pacific Railroad Company in 1885, testified

that in 1885 Mr. Stanford, Mr. Huntington, Mr. Crocker, and the Hopkins estate each held between 30,000 and 35,000 shares of stock in the Central Pacific Railroad Company (645), i. e., about 6 per cent of the total; that the voting control was in the employees of the company (645), and that approximately 30 per cent of the stock in the company was held outside of the employees and Messrs. Stanford, Huntington, Crocker, and the Hopkins estate (647).

The time of transfer of any shares in this corporation is of little or no assistance in determining when the stock was actually sold, because the Central Pacific Railroad Company had adopted a form of certificate which made it unnecessary to have the stock transferred in order to obtain direct payment of dividends. The certificate had attached, numbered warrants for dividends payable to bearer, somewhat like the coupons attached to a bond. (P. Ex. 61, p. 1659; Hopkins, 615; Klink, 679.)

When stock was sold the delivery was made by certificates standing in the name of the employees, and a considerable part of the stock so delivered was not sent back for transfer for some length of time. (Davis, 133.) It is not unlikely that the purchasers were induced to refrain from transferring shares into their own names by the possibility that they would become liable for the debts of the company under the laws of California as stockholders of record. (Hopkins, 681.)

Mr. Timothy Hopkins, the adopted son of Mark Hopkins, and active in the management of his estate

from 1880 to 1889, testified that some of the stock standing in the name of the employees had been sold in this country and in Europe. (Hopkins, 680.)

In October, 1884, W. E. Brown, as secretary of conferences held between Mr. Stanford, Mr. Huntington, Mr. Crocker, and Mr. Timothy Hopkins, made up a statement of the Central Pacific stock on hand of the four interests, which showed the total number of shares as 157,535, out of the total capital then outstanding of 592,755 shares. (D. Ex. 21, p. 1695; Hopkins, 666, 677.)

Mr. Jackson fixed the amount in his recollection at between 30,000 and 35,000 shares apiece (645)—a total for the four of 140,000 shares.

Mr. Hopkins was unable to say whether or not in the spring of 1885 more than 50 per cent of the entire capital stock of the company was owned by outside stockholders who had not transferred the stock from the names of the employees into their own names (690).

In 1887 Mr. Stanford testified to the Pacific Railway Commission that he owned 32,000 shares, par $3,200,000 (i. e., 5 per cent) out of a total of about 670,000 shares, par $67,000,000 (98), and that he thought they succeeded in selling their shares in 1880 (98).

The decree of distribution of Mr. Stanford's estate, entered December 28, 1898, indicates that at his death in 1893 he held 32,973 shares (872).

The inventory of Mr. Crocker's estate of July 12, 1889, shows that he held 34,049 shares (871).

The most probable time for the sale of the stock would naturally be while it was a dividend-paying stock. (Speyer, 1196; Hopkins, 682.)

The company paid substantial dividends from 1873 to January 15, 1884, a total of more than 50 per cent (P. Ex. 41, p. 1637), and no dividends thereafter for four and a half years, after which time dividends of 1 and 2 per cent per year were paid until 1894, and none thereafter.

In 1896 Mr. Huntington testified before a committee of Congress that he had 4,000 or 5,000 shares (102); that no stockholder of the Central Pacific Railroad Company had exchanged his shares for stock in the Southern Pacific Company (102); that he always had 4,000 or 5,000 shares (103); that he did not know that he ever owned more than 6,000 shares (672); that the stock issued by the Central Pacific Railroad Company to the construction company, the Contract & Finance Co., did not come into their hands, but was sold to pay the debts of that company along in the seventies (104); that the stock sold as high as 85, he thought, between 1870 and 1880 (105); that they began to sell the shares when they began to appreciate (673); and that he did not believe that he had ever bought any shares of the stock.

There is no affirmative evidence that any substantial amount of stock in the Central Pacific Railroad Company was sold between 1884 and 1898. The attractive dividends ceased in 1884. It appears from a record of a stockholders' meet-

ing of the company held on April 12, 1898 (P. Ex. 17, p. 1418), that on that date 332,509 shares were held by the Central Pacific Railroad Shareholding Co. (Ltd.), and 32,973 shares by the Stanford family or estate. This last amount is about the same as that stated by Mr. Stanford as owned by him in 1887 (98), and about the same as the amount held by Mr. Crocker's estate in 1889 (871), and about the same as the amount which Mr. Jackson says that each of them held in the spring of 1885 (645).

The Central Pacific Railroad Shareholding Co. (Ltd.) was a British corporation, all the shareholders in which, shown on such papers as it filed with the registrar of joint-stock companies, were residents of England. (P. Ex. 21, p. 1468, 1472.)

The Commercial and Financial Chronicle for February 25, 1899, introduced in evidence by the defendants, stated that the London shareholders' committee represented a majority of the outstanding shares of the Central Pacific Railroad Company. (D. Ex. 95, p. 2267.)

In 1899, in executing the plan for the Southern Pacific Company to acquire the stock of the Central Pacific Railroad Company, the shareholders deposited their stock, for exchange, with Speyer & Co. in New York, Speyer Bros. in London, and Texeira de Mattos Bros. in Holland. Subsequently the Central Trust Co. in New York issued shares in the Southern Pacific Company against the certificates of deposit which had been issued by these three

depositaries. The records of the Central Trust Co. in New York show that the deposits in New York amounted to 370,154 shares (Coles, 265), and those in London to 219,941 shares (Coles, 266), and those in Holland to 79,910 shares (Coles, 266), a total of 670,005 shares.

The deposits were made in many instances by bankers or brokers, and not necessarily by the owners of the certificates. The certificates of deposit were many. Speyer & Co.'s record (P. Ex. 29, p. 1525) shows over 700 depositors, only a few of whom made a deposit of more than 1,000 shares. Of this few, only about five deposits exceeded 10,000 shares, and no one deposit exceeded 18,000 shares.

The strong probabilities are that there was always a substantial number of shareholders from the general public in the Central Pacific Railroad Company; that this number was greatly increased between 1877 and 1884 by sales which were made by Mr. Stanford, Mr. Huntington, Mr. Crocker, and the estate of Mr. Hopkins, so that by the beginning of 1885 these four interests held less than 35,000 shares each, making together less than 25 per cent of the shares then issued, and the remaining shares, 75 per cent were held by members of the public in this country and in England who had invested in the stock, and either had recorded their transfers or had left them registered in the names of the employees in the office of the company.

The reason for the different treatment of the stock of the Southern Pacific Railroad Company and that

of the Central Pacific Railroad Company when the Southern Pacific Company was organized was that substantially all of the stock in the Southern Pacific Railroad Company was held by the promotors of the Southern Pacific Company, whereas there were these many independent stockholders in the Central Pacific Railroad Company. (Hopkins, 688.)

The majority opinion below makes no reference to all this evidence, although there is no conflict in it.

It is indisputable that in 1885 a majority of the stock of the Central Pacific Railroad Company was owned by persons having no interest in the Southern Pacific Railroad Company or in the Southern Pacific Company.

FIFTH ASSIGNMENT.

The Southern Pacific Company on February 20, 1899, had no contractual, or property, or vested interest, direct or indirect, in the Central Pacific Railroad, because (1) the purported lease of February 17, 1885, by the Central Pacific Railroad Company was void for lack of power in that company to make it, both under the laws of California and under the laws of the United States, the sovereignty from which it derived its franchises; (2) in 1893 this lease was canceled and the new purported lease then given was equally void for the same reason; and (3) the leasehold interest was subject to immediate destruction by the foreclosure of the underlying lien of the United States.

The combination of which the petition complains consists of the acquisition by the Southern Pacific

Company in 1899 of the stock of the Central Pacific Railroad Company, and its successor, the Central Pacific Railway Company. This was nine years after the enactment of the antitrust act of July 2, 1890. The defendants seek to defeat the petition by saying that, even if this combination was a restraint of trade, the defendant Southern Pacific Company had acquired a vested right to this restraint before the antitrust act was passed.

The only way, if at all, in which the Southern Pacific Company can have acquired any such vested right is through the lease made to it by the Central Pacific Railroad Company in 1885. If this lease was void, the Southern Pacific Company had no such vested right. It is of no consequence in this connection what was the cause of the invalidity of the lease; that is, whether it was lack of the proper votes of the stockholders in the lessor company, lack of corporate authority, lack of power under the State laws, or lack of power under the Federal laws.

With due respect it must be said that the majority opinion appears to overlook this entirely. In one place the majority say:

> We do not think the statute (the antitrust act of July 2, 1890) was intended to create competition by destroying a proprietary relation formed long before its passage (2331).

At another place they say:

> It is also argued that the leases mentioned were not authorized by the statutes of California. We need not consider that. We do not think the antitrust act picks up the laws of the States for original enforcement (2330).

It will be observed that the petitioner is not asking the court to pick up the laws of the State for original enforcement. The petitioner is not asking any enforcement of those laws. The petitioner says merely that the "proprietary relation," which the majority of the court below assumes, did not exist, because no property right, and indeed no contract right, had been granted by the Central Pacific Railroad Company to the Southern Pacific Company before 1890 (313).

Therefore it is necessary to determine whether or not the Southern Pacific Company had any lease of the Central Pacific Railroad. It certainly had no other property or contract right in that railroad.

Incidentally it should be noted that the majority of the court below, although referring to the argument that the lease was not authorized by the statutes of California, has entirely ignored the argument that the lease was unauthorized under the acts of Congress and also apart from statute.

FIRST.

THE PURPORTED LEASE OF FEBRUARY 7, 1885, BY THE CENTRAL PACIFIC RAILROAD COMPANY WAS VOID FOR LACK OF POWER IN THAT COMPANY TO MAKE IT, BOTH UNDER THE LAWS OF THE STATE OF CALIFORNIA AND UNDER THE LAWS OF THE UNITED STATES, THE SOVEREIGNTY FROM WHICH IT DERIVED ITS FRANCHISES.

It is well settled that a railroad corporation in the absence of express authority from the legislative body which granted its franchise can not make a lease of its railroad for a period of 99 years.

Central Transportation Co. v. *Pullman's Palace Car Co.*, 139 U. S. 24.

Union Pacific Railway Co. v. *Chicago, Rock Island & Pacific Railway Co.*, 163 U. S. 564, 581, *dictum.*

Oregon Railway Co. v. *Oregonian Railway Co.*, 130 U. S. 1.

Pittsburgh Railroad v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, *dictum.*

Green Bay & Minnesota Railroad Co. v. *Union Steamboat Co.*, 107 U. S. 98, *dictum.*

Pennsylvania Railroad Co. v. *St. Louis Railroad*, 118 U. S. 290.

Branch v. *Jesup*, 106 U. S. 468.

Thomas v. *Railroad Co.*, 101 U. S. 71.

Zabriskie v. *Cleveland Railroad*, 23 How. 381.

Pearce v. *Madison & Indianapolis R. R.*, 21 How. 441.

Elkins v. *Camden & Atlantic R. R. Co.*, 36 N. J. E. 5, and notes.

Morris Run Coal Co. v. *Barclay*, 68 Pa. St. 173.

Salt Company v. *Guthrie*, 35 Ohio St. 666.

Raymond v. *Leavitt*, 46 Mich. 447.

Arnot v. *Pittston Coal Co.*, 68 N. Y. 558.

Chicago Coal Co. v. *People*, 214 Ill. 421.

Alger v. *Thatcher*, 19 Pick. 51.

State v. *Hartford & New Haven R. R. Co.*, 29 Conn. 538.

Central R. R. Co. v. *Collins*, 40 Ga. 582, 628.

This principle has received recognition in the constitution and in the statutes of most of the States of the United States, and particularly with reference to railroads.

This invalidity of railroad leases in restraint of trade did not come into existence through the Sherman Antitrust Act. That act merely made criminal and gave certain preventive remedies for the kinds of agreements for monopolies and restraints of trade which by the existing law were invalid.

Standard Oil Co. v. *United States*, 221 U. S. 1.

United States v. *American Tobacco Co.*, 221 U. S. 106.

It follows from the competitive character of these two railroads that even if the Central Pacific Railroad had authority to make a lease, it could not make a valid lease to the Southern Pacific Company. But it had no such power, either under the laws of California or under the laws of the United States,

and authority from the United States was essential to the making of a lease.

The only purposes for which the Central Pacific Railroad Company was incorporated under the laws of California were to "purchase, construct, own, maintain, and operate" railroad lines. (P. Ex. 12, pp. 277, 280.) These powers were never increased.

The constitution of California, adopted May 7, 1879, and in force in 1885, provided in article 12:

> SEC. 9. No corporation shall engage in any business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized, nor shall it hold for a longer period than five years any real estate except such as may be necessary for carrying on its business.
>
> SEC. 10. The legislature shall not pass any laws permitting the leasing or alienation of any franchise, so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges.

Not only was there no authority under the articles of this corporation to make a lease, but also there was no legislative authority to a railroad corporation to make a lease of this kind.

The general railroad act of May 20, 1861 (ch. 534, p. 609), under which this company was incorporated, gave no authority to a railroad corporation to make a lease. In 1863 section 4 of this act was so

amended as to permit railroad corporations to lease to other corporations organized under the same act, but this amendment made no provision for leasing to corporations organized under the laws of another State. It provided that—

> Any railroad corporation organized under the act to which this is amendatory shall have the right to lease the whole or any portion of their road to any other corporation organized under this act, or to grant to any such corporation the right to use in common any portion of their road. (1 Hittell, art. 838.)

Evidently this provision is not applicable, because the lessee, the Southern Pacific Company, was organized not under this law, or indeed under any law of California. It was organized under the laws of the State of Kentucky.

On April 3, 1880, the California Legislature passed an act (ch. 65, p. 114) which provided:

> Railroad corporations doing business in this State and organized under any law of this State, or the United States, or of any State or Territory thereof, have power to enter into contracts with one another whereby the one may lease of the other the whole or any part of its railroad, or may acquire of the other the right to use, in common with it, the whole or any part of its railroad.

This act has been urged by the Southern Pacific Company in several cases, to establish the validity of this agreement of lease, but in none of these cases

has the court found it necessary to pass upon the question.

Lee v. *Southern Pacific Railroad Company*, 116 Calif. 97; 47 Pacific 932.

Johnson v. *Southern Pacific Railroad Company*, 154 Calif. 285; 97 Pacific 520.

Southern Pacific Company v. *U. S.*, 28 Ct. of Claims 77.

Southern Pacific Company v. *Railroad Commissioners*, 78 Fed. 236, 249.

The only right to lease which was given by this act was to corporations "doing business in this State."

At the time of the lease in question (Feb. 17, 1885) the lessee, the Southern Pacific Company, was not doing business in California. (Breckenfeld, 459, 462; Englebright, 467; Pratt, 481, 491, 493, 523; Norton, 551; Railton, 572, 577; Klink, 601, 610.)

It began its first business in California in the spring of 1885, when it began to operate the Southern Pacific Railroad and the Central Pacific Railroad. (Breckenfeld, 459, 462; Englebright, 467; Pratt, 482, 485, 492, 493; Norton, 551; Railton, 572, 577; Klink, 601, 610.)

Obviously the taking of a lease can not constitute doing business within the terms of this statute. Otherwise the words would never have any effect.

The apparent purpose of this section is to permit a railroad corporation operating its own railroad to acquire a lease of lines that may be useful in supplementing its operations. It was not intended to permit railroad corporations to turn over their entire

properties and franchises for a period of 99 years as a means of accomplishing a virtual substitution of one corporation for the other in the operation of a railroad.

It has been argued for the defendants that the Southern Pacific Company was doing business in California on February 17, 1885, because it had obtained a lease from the Southern Pacific Railroad Company for a term immediately to begin on February 10, 1885, although no operations were undertaken under this lease until March 1, 1885. The defect in the argument is that it ignores the fact that the lease by the Southern Pacific Railroad Company to the Southern Pacific Company was also an unauthorized lease under this statute. The only statute under which the Southern Pacific Railroad Company could make a lease was that which provided that it could lease to a corporation doing business in California. The Southern Pacific Company was not doing business in California on February 10, 1885. Under these circumstances the taking of a lease from the Southern Pacific Railroad Company no more constituted doing business than did taking a lease from the Central Pacific Railroad Company. Both leases were outside of the letter and the purpose of the statute.

It follows that, even apart from the requirements of the laws of the United States, this lease was not a lease.

But the most vital requirement of all to a valid lease was authority from the United States.

The several railroads either incorporated or aided by the United States by the Pacific Railroad acts are

without authority to dispose of the franchises derived from those acts.

U. S. v. *Union Pacific Railroad Co.*, 160 U. S. 1, 28.

It has been affirmed repeatedly that the United States was the origin of the franchises of the Central Pacific Railroad Company and of the Southern Pacific Railroad Company.

California v. *Pacific Railroad Co.*, 127 U. S. 1, 44.

Sinking Fund Cases, 99 U. S. 700, 728.

Central Pacific Railroad Co. v. *Cal.*, 162 U. S. 91, *semble*.

U. S. v. *Stanford*, 161 U. S. 412; 70 Fed. 346; 69 Fed. 25, 38.

The Central Pacific Railroad Company in the lease in question of February 17, 1885, describes itself as a corporation "under the laws of the State of California and the United States" (13).

In 1852, before this corporation was organized, the California Legislature had passed an act to grant to the United States a right of way through California for a railroad from the Atlantic to the Pacific Ocean (ch. 77, p. 150), and had instructed its Senators and Representatives (ch. 852, p. 276) to vote for an act of Congress for a railway from the Missouri River and the Mississippi River to the Pacific Ocean.

The Central Pacific Railroad Company did not begin construction until Congress had passed the Pacific Railroad laws of 1862, and when it began

construction it was under these laws and with the subsidy provided by them.

On April 4, 1864, the legislature of California passed an act (ch. 417, p. 471) by which it confirmed the franchise which the United States had granted to the Central Pacific Railroad Company of California, and repealed all conflicting provisions.

This act, Mr. Justice Field, in *Central Pacific Railroad Co.* v. *California*, 162 U. S. 91, 133, said abrogated "the State franchises of those corporations and substituted by adoption in their place the Federal franchises which have remained in force ever since."

The Pacific Railroad laws of 1862 and 1864 required the Central Pacific Railroad Company "to operate and use its railroad." (P. Ex. 3, p. 1244.)

The railroad was constructed and operated not only in California, but also in Nevada and Utah. The only source of the franchise for such a railroad was the United States.

It is immaterial that corporate existence was derived from the laws of California. This corporation, as it existed before the Pacific Railroad acts of Congress were passed, had an authorized capital of $8,500,000, and under the California law it could not borrow in excess of an equal amount and must provide a sinking fund for the redemption in money of the bonds issued.

Sinking Fund Cases, 99 U. S. 700, 727.

The bonds issued for the construction of the original Central Pacific Railroad amounted to more than

$50,000,000, and the right to issue them or to get them came from the United States. The California act of 1864 amounted only to a recognition of the powers which had been granted by Congress.

Sinking Fund Cases, 99 U. S. 700, 728.

The duty of the Central Pacific Railroad Company "to operate and use" its road ran to the sovereignty which granted the franchise. It could not part with that franchise or the right to use that franchise, or delegate the operation of that franchise, or the performance of the duties under it to any other corporation or individual without authority from Congress. The United States was the donor of the franchise, and the one to impose the conditions upon its exercise, and therefore the only one that could modify or dispense with the performance of those conditions. The Central Pacific Railroad Company could not take from the United States the right of way, the public lands, the bonds of the United States, and the other rights conferred by the United States, and then be excused from the performance of the duties imposed by the United States, or delegate the performance of those duties to any one else unless authority therefor was given by Congress.

The Central Pacific Railroad Company by this lease completely deprived itself of the power to operate its railroad as required by the Pacific Railroad acts. If the Southern Pacific Company chose to use this railroad to support the business of the Southern Pacific Railroad, and thereby to diminish the business of the

Union Pacific Railroad, the Central Pacific Railroad Company was practically powerless to prevent this discrimination against the Union Pacific Railroad if the lease was enforceable.

Congress has never given any authority to make this lease. The only suggestion which the defendants have made to the contrary is that the approval of the agreement between the United States and the Central Pacific Railroad Company and Speyer & Co. of February 1, 1899, constituted a consent to the lease because the lease was to be subordinated to the new first refunding bond mortgage. There are at least two answers to this suggestion: (1) That consenting that a mortgage shall have priority to an existing lease does not amount to an agreement that the lease is valid or shall become valid, but it merely prefers the mortgage to the lease whether valid or not, and (2) that Congress, it would appear, never had any knowledge whatever of the agreement to subordinate the lease. The agreement between the United States and the Central Pacific Railroad Company and Speyer & Co. contained no reference whatever to any such subordinating agreement. It is not mentioned in the plan of readjustment. (D. Ex. 45(a); Ex. B of answer, p. 60.) It is not mentioned in the commission's report to Congress, or in the Attorney General's report.

Six months after the date of the agreement—namely, on August 1, 1899—the Southern Pacific Company executed agreements to subordinate the

lease to the new mortgages, but there is nothing to show or to suggest that these agreements were known to any representatives of the Government. It is probable that no officer of the Government or any single member of Congress ever had the slightest knowledge of them. Considering the clarity required for grants of rights from Congress to private individuals, this is too slender a thread on which to hang congressional authority to the Central Pacific Railroad to lease to the Southern Pacific Company.

It follows that for lack of authority from the United States this lease in 1885 was not a lease.

Consequently, because the lease (1) was to a competing railroad; (2) was by a corporation having by its articles, under the constitution of California, no authority to lease; (3) was without authority from the California Legislature; and (4) was without authority from the United States, the Southern Pacific Company on July 2, 1890, when the antitrust act was passed, had no lease of the Central Pacific Railroad and no proprietary interest and no contractual interest, and no other right therein.

SECOND.

IN 1893 THIS LEASE WAS CANCELED AND THE NEW PURPORTED LEASE THEN GIVEN WAS EQUALLY VOID FOR THE SAME REASON.

Even assuming that the void lease of February 17, 1885, was a valid lease, all rights under that lease ended on January 1, 1894, except the adjustment of accounts in respect to prior operation.

On December 7, 1893, the Southern Pacific Company and the Central Pacific Railroad Company purported to enter into a new agreement of lease, and section 5 of this agreement provided in terms that—

> Fifth. The agreements between the same parties, dated February 17, 1885, and January 1, 1888, respectively, are hereby canceled except so far as they relate to operation of said demised premises prior to January 1, 1894, and to adjustment of accounts in respect to such operation thereof.

This agreement provided for a different rental. The original lease provided for a rental of $1,200,000 a year in any event, and in addition the total net income from operation up to $2,400,000. The new lease provided for a fixed rental of $10,000 only, and the net income from operation, with the proviso that if that income exceeded 6 per cent on the outstanding capital stock of the Central Pacific Railroad Company, then only one-half of the excess should go to the Central Pacific Railroad Company.

In the court below defendants argued elaborately that the doctrine of *implied* surrender of an existing leasehold, by the acceptance of a new lease, applied only where the new lease was valid. In this discussion they made no reference whatever to a termination by *express* agreement. Assuming that this principle limiting the doctrine of implied surrender is sound, it has no application. The termination of the old lease in this case was not left to implication.

There was a clear, express agreement to terminate the old leasehold in the quoted fifth section of the new agreement. There was nothing invalid about this section. The parties agreed to terminate and the agreement was effective to terminate.

There was nothing unlawful or criminal about the agreement in that section, nor can the position of the defendants be bettered by saying that they should be relieved from this terminating agreement which they made, and relieved because they made it under the mistaken belief that they were getting a new valid lease. There is nothing to indicate that they made any mistake of fact or any mistake of law. The making of the new lease was of itself the commission of the crime denounced by the Sherman Antitrust Act. Evidently, if the defendant can not retain the fruits of that offense, the court should not help them out by giving back to them the old lease which they gave up in connection with the commission of that offense. The case differs radically from all those referred to in which the failure to get a new valid lease was due to some imperfection of power, or execution, or mistake of fact, and not to the fact that the transaction in which the intending lessee engaged was a crime.

Unquestionably the only lease under which the Southern Pacific Company was operating in 1899 was a lease made three years after the Sherman Antitrust Act became effective.

THIRD.

THE LEASEHOLD INTEREST WAS SUBJECT TO IMMEDIATE DESTRUCTION BY THE FORECLOSURE OF THE UNDERLYING LIEN OF THE UNITED STATES.

On this branch of the case the important consideration is whether in 1899, when the Sherman Antitrust Act was in effect, the Southern Pacific Company acquired a greater power to restrain competition than it possessed before 1890.

At best for it, in 1890 it had only a leasehold interest subject to an underlying lien for the security of the first-mortgage bondholders, and a second underlying lien for the security of the payment to the United States of the amount of the bonds which the United States had given, and for the interest thereon.

In 1898 this second lien had matured and the lease consequently was subject to immediate destruction by foreclosure of the lien in favor of the United States.

Under the act of July 7, 1898, Congress instructed the President to foreclose this lien if the debt was not settled within a year.

On February 1, 1899, before the new combination, the Southern Pacific Company was at the point of being deprived in this way of all control over the Central Pacific Railroad. Note the change wrought by the new combination if valid. On August 1, 1899, the Southern Pacific Company was the owner of all the stock of the Central Pacific Railroad Company and in no danger of being deprived of control of the Central Pacific Railroad by a foreclosure or

otherwise, if this scheme of February 20, 1899, was not subject to attack under the Sherman Antitrust Act, or under the Pacific Railroad laws.

It follows inevitably that after the enactment of the Sherman Antitrust Act the Southern Pacific Company has, by a combination formed by it, acquired a proprietary interest and a power over the commerce of the Central Pacific Railroad which it did not enjoy before.

SIXTH ASSIGNMENT.

Even if the Southern Pacific Company had had some control over the Central Pacific Railroad before the Sherman Antitrust Act was passed, this would not render lawful a combination for the increase and perpetuation of that control, formed after this act was passed.

It is not necessary to consider in this case whether or not the Sherman Antitrust Act prohibits a man from operating, after July 2, 1890, two separate, competitive railroads which become his property before 1890. No such case is presented. At best for the defendants the question is whether or not the combination imperfect before July 2, 1890, can thereafter, notwithstanding the antitrust act, be lawfully operated and be made more firm and indestructible.

The words of the act are enough to answer the question in the negative. It is not merely the making of the combination which is declared to be illegal. It is a misdemeanor to "engage in any

such combination." To continue to operate pursuant to such a combination is to engage in that combination.

It is not clear from the language of the majority of the court below just what view they entertain concerning this particular question. After discussing the lease of 1885 and the new lease of 1893, the court says:

> The applicability of the antitrust act can not be made to rest on such considerations (2330).

This is the only approach to a decision below upon this particular question. On the other hand, Judge Carland says:

> The fact that prior to the passage of the antitrust act there had been a practical control of the Central Pacific by the Southern Pacific by a leasing arrangement in no way validates the present arrangement if it be unlawful (2337).

It is common knowledge that the evils which Congress sought to remedy in 1890 were those already in existence and to some extent known and generally discussed.

Several of the more prominent combinations the continuance of which has been enjoined by the courts were in existence when the statute was passed.

> *Standard Oil Co.* v. *United States*, 221 U. S. 1, 70; 173 Fed. 177, 186.
>
> *United States* v. *American Tobacco Co.*, 221 U. S. 106, 176; 164 Fed. 700, 722.

United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 342.

U. S. v. *Lehigh Valley R. R. Co. et al.*, decided December 6, 1920 (41 Sup. ct. Rpts. 104).

Both liberty of contract and the use of property are subject to regulation by the police power of the sovereign for the general good.

Mugler v. *Kansas*, 123 U. S. 623.

Louisville & Nashville R. R. Co. v. *Kentucky*, 161 U. S. 677, 695–700.

Union Bridge Co. v. *United States*, 204 U. S. 364, 400, *semble*.

For example, the commodities clause of the Hepburn Act (June 29, 1906; 34 Stat., c. 3591, p. 584) denying to carriers the right to transport coal owned by them at the time of transportation, prohibits such transportation after the act became operative, notwithstanding the fact that the coal was nearly valueless without opportunity for transportation and that the coal and the transportation facilities were acquired and developed lawfully many years before the act was passed, and under powers granted by one of the States in pursuance of an established policy to encourage this method of developing its natural resources.

United States v. *Delaware & Hudson Co.*, 213 U. S. 366.

In *Philadelphia, Baltimore & Washington R. R. Co.* v. *Schubert*, 224 U. S. 603, 613, holding that the employees liability act, avoiding employees' contracts exempting employers from certain lia-

bilities, avoided such contracts made before the act was passed, the court said:

> The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority.

In the absence of a grant from the sovereign no one had acquired a vested right on July 2, 1890, to restrain commerce or to monopolize it for the future. If the makers of a combination created before 1890 could not be punished for their acts done before 1890, it by no means follows that they could

not be punished for continuing to engage in the combination after 1890.

To engage in a combination in restraint of trade after 1890 is not rendered lawful by the fact that the combination existed before 1890.

United States v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 342.

Waters-Pierce Oil Co. v. *Texas*, 212 U. S. 86, 108.

United States v. *Kissel*, 218 U. S. 601, *semble.*

Armour Packing Co. v. *United States*, 209 U. S. 56, 80, *semble.*

Louisville & Nashville R. R. Co. v. *Mottley*, 219 U. S. 467, *semble.*

United States v. *Delaware & Hudson Co.*, 213 U. S. 366, *semble.*

Elliott Machine Co. v. *Center*, 227 Fed. 124 (D. C. W. D. Mich.), *semble.*

United States v. *Swift*, 186 Fed. 1002 (D. C. N. D. Ill.), *semble.*

Thomsen v. *Union Castle Mail Steamship Co.*, 166 Fed. 251, 253 (C. C. A. 2d), *semble.*

Boyd v. *New York & Harlem R. Co.*, 220 Fed. 174, 180 (D. C. S. D. N. Y.), *dictum.*

United States v. *American Tobacco Co.*, 164 Fed. 700, 722 (C. C. S. D. N. Y.), *dictum.*

Ford v. *Chicago Milk Shippers Ass'n*, 155 Ill. 166, 39 N. E. 651.

Finck v. *Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213.

U. S. v. *United Shoe Machinery Co.*, 227 Fed. 507. (D. C. E. D. Mo.)

The Southern Pacific Company in the case at bar not only continued to operate under the combination existing before 1890, but also in 1893 canceled the agreement under which it was operating and made a new agreement of lease, and finally, in 1899, attempted to perfect its control by acquiring the stock in the Central Pacific Railroad Company at a time when the Central Pacific Railroad was about to pass into the hands of the United States or of such purchaser as might acquire it on the foreclosure of the lien of the United States.

This acquisition was a new, unlawful combination, which was not made lawful by the prior relations between the two companies.

The additional defenses alleged by the defendants which were not discussed in the opinions in the district court.

There remain to be considered certain defenses alleged in the answers of the defendants or urged by them below and apparently not considered by the court below, namely:

(1) The decree in the case of the *United States* v. *Union Pacific Railroad Company*, as *res adjudicata* in favor of the defendants; (2) the estoppel of the United States by inconsistent position taken in the Union Pacific case; (3) the absence of complaint of this restraint of trade in the *Union Pacific case;* (4) laches; and (5) the statute of limitations.

FIRST.

IN THE CASE OF THE UNITED STATES AGAINST THE UNION PACIFIC RAILROAD COMPANY THE COURT DID NOT ADJUDGE EXPRESSLY OR BY INFERENCE THAT IT WAS NOT UNLAWFUL FOR THE SOUTHERN PACIFIC COMPANY TO HOLD THE STOCK OF THE CENTRAL PACIFIC RAILWAY COMPANY.

The defendants in their answer claim that the decree in the case of the United States against the Union Pacific Railroad Company carries in solution a judgment that it was lawful for the Southern Pacific Company to hold the stock of the Central Pacific Railway Company. This is without foundation.

On February 1, 1908, the United States filed in the Circuit Court of the United States for the District of Utah a petition against the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, the Oregon Railroad & Navigation Company, the San Pedro, Los Angeles & Salt Lake Railroad Company, the Atchison, Topeka & Santa Fe Railway Company, the Southern Pacific Company, the Northern Pacific Railway Company, the Great Northern Railway Company, and certain individual defendants, complaining of restraints of trade by the Union Pacific Railroad Company and others in the acquisition of stock by the Union Pacific Railroad Company (or its subsidiaries or associates) in (1) the Southern Pacific Company, (2) the Northern Pacific Railway Company, (3) the

San Pedro, Los Angeles & Salt Lake Railroad Company, (4) the Atchison, Topeka & Santa Fe Railway Company.

When the Supreme Court rendered its decision and entered its decree in this case, neither the Central Pacific Railroad Company nor the Central Pacific Railway Company was a party to this suit. No relief was asked as to the control of the Central Pacific Railroad by the Southern Pacific Company. The petition contained no allegation that the Central Pacific Railroad was in competition with the Southern Pacific Railroad.

There was no allegation in the answer putting in issue the fact of the control of the Central Pacific Railroad by the Southern Pacific Company or the propriety thereof.

The defense mainly relied upon in the case was that, inasmuch as the Union Pacific Railroad Company, in the movement of transcontinental freight, always had been dependent upon the Central Pacific Railroad, controlled by the Southern Pacific Company, the Union Pacific Railroad and the Southern Pacific Railroad never had been in a position to compete with each other substantially and practically.

The court below (188 Fed. Rep. 102), except Judge Hook dissenting, held that this defense was made out. The court below held unanimously that there was no ground for relief as to the stock held by the Union Pacific Railroad Company in the Northern Pacific Railway Company, the Atchison,

Topeka & Santa Fe Railway Company, and the San Pedro, Los Angeles & Salt Lake Railroad Company.

On appeal the Supreme Court held (226 U. S. 61) that the decision below was correct with respect to the stock of these last three companies, but that there had been a substantial and practical competition between the Union Pacific Railroad Company and the Southern Pacific Company which was unreasonably restrained by the acquisition of control of the stock of the Southern Pacific Company by the Union Pacific Railroad Company or by subsidiary companies controlled by it. The petitioner in the case at bar makes no contention at variance with this decision, but, on the contrary, relies on it.

Neither counsel for the parties in the briefs, nor the court in its opinion, expressly or by implication, urged or upheld as lawful the control of the Southern Pacific Company over the Central Pacific Railroad.

1. *The court made no decision on this question.*

The only restraint of commerce alleged in this case was that accomplished by the Union Pacific Railroad Company or its subsidiaries or associates. A straddling petition which sought at one time to obtain relief from a restraint of commerce composed of an acquisition of the stock of the Southern Pacific Company by the Union Pacific Railroad Company and a restraint of commerce composed of an acquisition of the stock of the Central

Pacific Railway Company by the Southern Pacific Company, two wholly independent transactions, two years apart, if it was not multifarious, at least would not be conducive to simplicity and efficiency in trial. Whether or not permissible, it was not attempted.

No issue was raised as to the legal effect or as to the propriety of the control of the Central Pacific Railroad by the Southern Pacific Company. Evidence showing the competitive character of the Southern Pacific Railroad with the Central Pacific Railroad and the lack of competition between them, unless material for some other purpose, was inadmissible.

It would have caused surprise to the court and to the counsel for the respective parties to learn that they were trying the question of undue restraint of trade by the Southern Pacific Company in holding the stock of the Central Pacific Railway Company. If that question was not on trial, the decision did not dispose of it.

The statement of the Supreme Court quoted in the answer in the case at bar, that "we find no reason to disturb the action of the court below," is taken from the context—

> so far as concerns the attempt to acquire the Northern Pacific stock and the stock of the Atchison, Topeka & Santa Fe Railway Company, afterwards abandoned, and a certain interest in the San Pedro, Los Angeles & Salt Lake Railroad Company and other feat-

ures of the case which were dealt with and disposed of by the decree and opinion of the court below.

The court below did not deal with the lawfulness of the holding of the stock of the Central Pacific Railway Company by the Southern Pacific Company. The only subjects with which it dealt were: (1) The unreasonable restraint of the competition of the Southern Pacific Company by the Union Pacific Railroad Company; (2) the acquisition of the stock of the Northern Pacific Railway Company (188 Fed. 117); (3) the acquisition of the stock of the Atchison, Topeka & Santa Fe Railway Company (117); (4) the acquisition of an interest in the San Pedro, Los Angeles & Salt Lake Railroad Company (117); and (5) the transactions between the Southern Pacific Company, the Phoenix & Eastern, and the California & Northwestern Railroad Companies (118).

These last four matters were the ones as to which the Supreme Court found no reason to disturb the action of the court below.

2. *Indispensable parties for such a decision were absent.*

The unreasonable restraint of commerce by the Southern Pacific Company is composed in part of the agreement of lease of December 7, 1893, by the Central Pacific Railroad Company to the Southern Pacific Company, and in part of the acquisition of the stock in the Central Pacific Railroad Company. Neither the Central Pacific Railroad Company nor

its successor, the Central Pacific Railway Company, was a party to the suit against the Union Pacific Railroad Company when the Supreme Court rendered its decision and entered its decree.

On February 8, 1913, after the suit was remanded to the District Court, the Southern Pacific Company, the Union Pacific Railroad Company, the Central Pacific Railway Company, and the Oregon Short Line Railroad Company entered into a conditional agreement (P. Ex. 20, p. 1428) to transfer the control of the Central Pacific Railroad from the Southern Pacific Company to the Union Pacific Railroad Company. This possibility had been suggested to the Supreme Court and was not disapproved by it. (226 U. S. 97.) This agreement was approved by the Attorney General, and on February 12, 1913, it was presented to the District Court for its approval (2203). All the parties to the agreement were parties to the suit, except the Southern Pacific Railroad Company and the Central Pacific Railway Company. The agreement and the action which the court might take on it would seriously affect these two companies. Consequently, they were made parties to the suit on that day. No allegations were made against either of them and no issue of fact or of law as to either of them was decided. The final decree followed the mandate of the Supreme Court (2202), issued before they were parties. The determinative act in the case was the decision of the Supreme Court rendered in December, 1912.

The Central Pacific Railway Company was directly interested in the validity of the lease of December 7, 1893. Even if permissible, it is improbable that the court would have passed upon the lawfulness of it in the absence of this company.

The absence of parties similarly interested in other transactions which the petitioner sought to question was pointed out by the court below as one of the reasons why the unlawfulness of those transactions should not be considered. (188 Fed. 118.)

The unlawfulness of a combination in restraint of commerce should not be adjudged in the absence of the parties directly interested.

Minnesota v. *Northern Securities Co.*, 184 U. S. 199.

3. *The effect of a decision in such a case is limited to what was actually decided.*

If two suits do not relate to the same property, claim, or transaction, the conclusiveness of the decision in one upon the other is limited to those issues actually tried.

Cromwell v. *County of Sac*, 94 U. S. 351.

Nesbit v. *Riverside Independent District*, 144 U. S. 610.

Davis v. *Brown*, 94 U. S. 423.

Boyd v. *Alabama*, 94 U. S. 645.

Virginia-Carolina Chemical Co. v. *Kirven*, 215 U. S. 252, 257, *dictum*.

Northern Pacific Ry. Co. v. *Slaght*, 205 U. S. 122, *dictum*.

Southern Pacific R. R. Co. v. *United States*, 168 U. S. 1, 49, *dictum*.

New Orleans v. *Citizens' Bank*, 167 U. S. 371, 396, *dictum*.

Last Chance Mining Co. v. *Tyler Mining Co.*, 157 U. S. 683, 687, *dictum*.

Packet Co. v. *Sickles*, 5 Wall. 580, 592, *dictum*.

Washington, Alexandria & Georgetown Steam-Packet Co. v. *Sickles*, 24 How. 333, *semble*.

Emma Silver Mining Co. (Ltd.) v. *Emma Silver Mining Co. of N. Y.* (C. C. S. D. N. Y.), 7 Fed. 401.

Clark v. *Blair* (C. C. D. Neb.), 14 Fed. 812.

Fairchild v. *Lynch*, 99 N. Y. 359, 368.

Arnold v. *Norfolk & New Brunswick Hosiery Co.*, 63 Hun. 176.

Howlett v. *Tarte*, 10 C. B. N. S. 813.

Foye v. *Patch*, 132 Mass. 105.

2 *Black on Judgments* (2 ed.), sec. 609, p. 926, sec. 614, p. 938.

In *Northern Pacific Railway Co.* v. *Slaght*, 205 U. S. 122, 131, the court said:

> There is a difference between the effect of a judgment as a bar against the prosecution of a second action for the same claim or demand, and its effect as an estoppel in another action between the same parties upon another claim or demand. (*Cromwell* v. *County of Sac*, 94 U. S. 351; *Bissel* v. *Spring Valley Township*, 124 U. S. 225; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Southern Pacific Railroad Company* v. *United*

States, 168 U. S. 1; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273; *Deposit Bank* v. *Frankfort*, 191 U. S. 499.)

In *Cromwell* v. *County of Sac*, 94 U. S. 351, it was held that the failure to recover on certain coupons, because of fraud in the original issue of the bonds to which they were attached, was not a bar to a recovery on other coupons on the same bonds because the plaintiff might show that he was a purchaser of the bonds for value without notice, although this same fact if shown in the first case would have enabled the plaintiff to prevail therein. The court said:

> There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that per-

fect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, can not again be brought into litigation between the parties in proceedings at law upon any ground whatever (352).

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and

determined. Only upon such matters is the judgment conclusive in another action (352).

It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action can not be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action (356).

There is nothing in this language, applied to the facts of the case, which gives support to the doctrine that, whenever in one action a party might have brought forward a particular ground of recovery or defense, and neglected to do so, he is, in a subsequent suit between the same parties upon a different cause of action, precluded from availing himself of such ground (358).

This case has been cited with approval repeatedly.

Northern Pacific Railway Co. v. *Slaght*, 205 U. S. 122, 131.

Virginia-Carolina Chemical Co. v. *Kirven*, 215 U. S. 252, 257.

Instances of closely related matters which for the purposes of this distinction have been held to be different claims or transactions are:

Coupons and the bonds to which they were attached:

Cromwell v. *County of Sac*, 94 U. S. 351.

Nesbit v. *Riverside Independent District*, 144 U. S. 610.

Board of Commissioners v. *Sutliff* (C. C. A. 8th), 97 Fed. 270.

Different installments of rent under the same agreement.

Chicago, R. I. & P. Ry. Co. v. *St. Joseph Union Depot Co.* (C. C. W. D. Mo.), 92 Fed. 22.

Howlett v. *Tarte*, 10 C. B. N. S. 813.

Separate notes taken at the same time under a single agreement that the indorsements should not be binding.

Davis v. *Brown*, 94 U. S. 423.

Separate acts of conducting a lottery under the protection of the same statute alleged to be unconstitutional.

Boyd v. *Alabama*, 94 U. S. 645.

A claim under a defective patent to land and a claim to have the holder of a valid patent declared a trustee.

Stark v. *Starr*, 94 U. S. 477.

Different parts of one location of mining claim.

Last Chance Mining Co. v. *Tyler Mining Co.*, 157 U. S. 683, 687.

Different statutory liabilities of the same stockholders for the same judgment against the same corporation.

Harrison v. *Remington Paper Co.* (C. C. A. 8th), 140 Fed. 385.

In *United States* v. *Union Pacific Railroad Company* the indispensable parties, the issues, and the cause of action differed from those in the case at bar, and no attempt was made to decide that it was lawful for the Southern Pacific Company to hold the stock of the Central Pacific Railway Company.

SECOND.

THE UNITED STATES IS NOT ESTOPPED BY ANY INCONSISTENT POSITION TAKEN IN THE UNION PACIFIC CASE.

It is contended for the defendants that the United States is barred by estoppel from taking a position inconsistent with the position which it took in the *Union Pacific case*. For the reasons already stated (p. 34) there is no inconsistency in the positions taken in the two cases. If there was it would not be a bar. The cases in which the United States has been held to be subject to the rule of estoppel of inconsistent position are those in which the property rights or the contract rights of the United States were under consideration. There is no such thing as estoppel of the United States when the United States is acting as a sovereign to enforce the criminal laws. (See Estoppel, *supra*, pp. 192.)

THIRD.

THE UNITED STATES IS NOT BARRED BY ABSENCE OF COMPLAINT OF THIS RESTRAINT OF TRADE IN THE UNION PACIFIC CASE.

It is contended for the defendants that the failure of the United States to complain of the combination of the Central Pacific Railroad Company with the Southern Pacific Company in the *Union Pacific case*, precludes the United States from making such a complaint thereafter because of the rule that a litigant must include the whole subject matter of his complaint in one suit and can not afterwards assign other grounds for complaint of the "same transaction."

This principle has no application to the situation before the court. The only "transactions" complained of in the *Union Pacific case* were restraints of trade by the Union Pacific Railroad Company in 1901 and thereafter. No transaction by the Southern Pacific Company was complained of. No transaction occurring in 1899 was complained of. The control of the Central Pacific Railroad by the Southern Pacific Company was no part of the restraint of trade by the Union Pacific Railroad Company. It was the Southern Pacific Company's control of the Southern Pacific Railroad and not of the Central Pacific Railroad that made the acquisition of stock in the Southern Pacific Company by the Union Pacific Company a restraint of trade. It would have been just as much a restraint of trade, and perhaps even more so,

if the Southern Pacific Company had not controlled the Central Pacific Railroad. The two transactions—the one the acquisition of control over the Central Pacific Railroad by the Southern Pacific Company and the other the acquisition of control over the Southern Pacific Railroad by the Union Pacific Railroad Company—were entirely distinct and neither one assisted the other. On the contrary, their tendency was to offset each other.

FOURTH.

THE PETITION IS NOT BARRED BY LACHES.

There has been no laches in bringing this suit, and also laches by the United States is not a defense to a petition to enforce a criminal law.

1. *There has been no unreasonable delay or laches in bringing the suit at bar.*

The combination complained of was perfected in 1899. Two years later the control of this combination was acquired by the Union Pacific Railroad Company. The orderly course for the United States to pursue in removing this compound restraint of commerce was to procure, first, the dissolution of the second combination, which controlled the earlier one and both of its elements. The petition for this purpose did not result in a final decree until June 30, 1913. The petition at bar was brought shortly thereafter. If the opinion of the court below in the suit against the Union Pacific Railroad Company that the suit was not well founded had

prevailed above, it would have affected materially the question whether the petition now at bar should be filed. Until the contentions made by the defendants in that case had been settled the petition at bar would have served no useful purpose. It was filed promptly after the decision in that case.

In *United States* v. *Reading Co.*, 253 U. S. 26, the principal combination dissolved by decision in 1920 was formed in 1896. The latest acquisition referred to, in the opinion, was in 1901.

2. *Laches by a sovereign is not a defense to a petition to enforce a criminal law.*

It is well established that the United States is not barred by laches.

Stanley v. *Schwalby*, 147 U. S. 508, 515, *dictum*.

United States v. *Dalles Military Road Co.*, 140 U. S. 599, 632.

United States v. *Insley*, 130 U. S. 263.

United States v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120.

United States v. *Van Zandt*, 11 Wheat. 184.

United States v. *Kirkpatrick*, 9 Wheat. 720, 735.

Northern Pacific Railway Co. v. *Ely*, 197 U. S. 1, *semble*.

Northern Pacific Railway Co. v. *Townsend*, 190 U. S. 267, *semble*.

Kindred v. *Union Pacific Railroad Co.*, 168 Fed. 648 (C. C. A. 8th).

United States v. *Willamette V. & C. M. W. R. Co.*, 54 Fed. (C. C. Ore.), 807, 810.

United States v. *International Harvester Co.*, 214 Fed. 987 (D. C. Minn.).

De Koven v. *Lake Shore & M. S. Ry. Co.*, 216 Fed. 955, 959 (D. C. S. D. N. Y.), *dictum*.

This principle is rested not on the extraordinary prerogative of the United States, but on public policy. The United States acts not for its personal benefit, but for all the people, whose sovereign it is. They should not be deprived of rights through the nonaction of the officials of the United States. Such nonaction is frequently due to a lack of knowledge of the facts upon which rights are based, a lack of knowledge which may be pardonable in view of the multiplicity of matters in which the rights of the United States are involved. The situation differs entirely from that of a private individual or corporation, whose business it is to look after his or its own rights in his or its own interest.

It is evident that there is much more reason why the United States should not be barred by laches when seeking to prevent a breach of the criminal laws than when seeking to enforce its property or contract rights. Even in the latter case laches is not a bar.

FIFTH.

THE LAPSE OF MORE THAN FIVE YEARS SINCE THE FORMATION OF THIS COMBINATION IS NOT A BAR.

The decree against the Union Pacific Railroad Company after able representation in defense is a strong indication that the statute of limitations is

not a bar in this case. The combination in that case was completed in 1901, and the petition was filed on February 1, 1908, and the statute was pleaded (2108).

United States v. *Union Pacific Railroad Co.*, 226 U. S. 61; 188 Fed. 102.

The situation was much the same in the petition against the Standard Oil Company.

Standard Oil Co. v. *United States*, 221 U. S. 1.

The United States is not barred by any statute of limitations, State or national, unless Congress expressly so provides.

United States v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120.

The defendants' answer, alleging the lapse of three years and of five years, respectively, as a bar under the statutes of the United States, indicates an intention to rely on Revised Statutes, section 1044, as amended by the act of April 13, 1876 (19 Stat. L., p. 32, ch. 56), and on Revised Statutes, section 1047 (U. S. Compiled Statutes, 1916, secs. 1708, 1712, pp. 3577, 3588), which provide that—

> SECTION 1044, amended. No person shall be prosecuted, tried, or punished for any offense not capital, except as provided in section ten thousand and forty-six, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed.

> SECTION 1047. No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued.

These sections furnish no defense, for two reasons: (1) Because this is not an indictment or information or suit or prosecution for a penalty or forfeiture, and (2) because the occurrence of an offense more than five years ago does not bar a proceeding to prevent the continuance of it hereafter.

1. *This is not an indictment, information, suit, or prosecution for a penalty or forfeiture.*

This is a petition for a remedial injunction.

Sections 1044 and 1047 and the context all relate to proceedings for punishment. None of them refer to remedial injunctions to restrain breaches in the future.

The two sections grew out of the act of April 30, 1790, chapter 9 (1 Stats., 112), relating to criminal prosecutions only. Section 32 of that act provided—

> That no person or persons shall be prosecuted, tried, or punished for treason or other capital offence aforesaid, willful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or committed; nor shall any person be prose-

> cuted, tried, or punished for any offence, not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture aforesaid.

Excepting treason and capital offenses, this section made no distinction between punishments, penalties, and forfeitures, pecuniary or otherwise.

The act of March 2, 1799, chapter 22, "to regulate the collection of duties on imports and tonnage," provided for penalties for breaches of the act and that they should be sued for in the name of the United States. Section 89 (1 Stats. 696) provided that "no action or prosecution" under this act shall be brought under this act except within three years after the penalty or forfeiture is incurred.

In February, 1804, in *Adams* v. *Woods*, 2 Cranch, 336, the court held that section 32 of the act of April 30, 1790, was a bar to a *qui tam* action of debt for a penalty, because it was a prosecution in substance and a remedy civil in form only.

The act of March 22, 1804, chapter 40, section 3 (2 Stats. 290), provided against the recovery of any "fine or forfeiture" under the revenue laws unless the "indictment or information" was found within five years.

The act of April 20, 1818, chapter 91, section 9 (3 Stats. 452), limited the time for "any prosecution, information or action * * * for any offense

under this act to five years." This was an act laying prohibitions upon the slave trade and providing for forfeitures for offenses against the act. The word "action" in this section adds nothing to the words "prosecution and information" as they had been construed in *Adams* v. *Woods*.

The act of February 28, 1839, chapter 36, section 4 (5 Stats. 322), was substantially in the language of the present section 1047.

From a comparison of these sections it is apparent that "suit" in section 1047 is used in the same sense as "action" in the act of 1818, and means a form of prosecution for a penalty or forfeiture.

It is the substantial result sought and not the form of action adopted which determines the applicability of these sections of the statute of limitations.

Gompers v. *United States*, 233 U. S. 604, 611.

A proceeding for a penalty is no less a criminal proceeding because the form of the action is civil. An action of debt for a penalty does not differ substantially from an information therefor.

Lees v. *United States*, 150 U. S. 476.

In this sense indictments, informations, and suits for penalties are recognized methods of criminal prosecution.

United States v. *Stevenson*, 215 U. S. 190, 198.

Mackin v. *United States*, 117 U. S. 348, 353.

Adams v. *Woods*, 2 Cranch, 336.

Williams v. *Wells Fargo & Co.*, 177 Fed. 352 (C. C. A. 8th), 355.

These different methods of procedure are grouped in sections 1044 and 1047. The difference between the two sections is in the substance of the punishment sought. Section 1047 is limited to cases in which the punishment sought is a penalty or forfeiture.

The proceeding in the case at bar is not for a penalty or for a forfeiture. A forfeiture is property taken as a penalty from an offender and going to the sovereign or to an informer. A common method of obtaining it is by a proceeding *in rem* against the property itself.

> *Dobbins Distillery* v. *United States*, 96 U. S. 395.
>
> *Gelston* v. *Hoyt*, 3 Wheat. 246, 310.

A penalty conveys the thought of punishment.

> *Huntington* v. *Attrill*, 146 U. S. 657, 667.
>
> *Brady* v. *Daly*, 175 U. S. 148, 156.

The first, second, third, and sixth sections of the Sherman Antitrust Act provide all the penalties and forfeitures which may be exacted as a punishment for the breach of the provisions of the act. The seventh section provides for a remedy to persons injured, and the fourth section provides a remedy, not for breaches of the act, but to prevent them. This section is wholly preventive and not punitive.

The suit of a private individual for damages for a breach of the Sherman Antitrust Act is not for a penalty.

Chattanooga F. & P. Works v. *Atlanta*, 203 U. S. 390; 127 Fed. 23; 101 Fed. 900.

Such damages, although trebled by the statute, are not a penalty, not because they are not as great an infliction upon the defendant as a fine would be, but because they are imposed, not as a punishment but as a compensation to the person injured.

The purpose of an injunction against making or engaging in unreasonable restraints of commerce is to prevent just such an injury. It is not punitive. It is to prevent injuries to each member of the community of a kind for which they as private individuals could recover damages. These damages are the kind held in *Chattanooga F. & P. Works* v. *Atlanta* not to be a penalty.

The petition at bar seeks to have the Southern Pacific Company dispose of the stock which it holds in the Central Pacific Railway Company, but does not seek a forfeiture of that stock or of its proceeds or to impose any penalty upon the defendants.

2. *The occurrence of an offense more than five years ago does not bar a proceeding to prevent the continuance of it hereafter.*

The offense sought to be prevented and restrained is continuing to engage in 1921 and thereafter in a combination in restraint of commerce, and not the making of the combination in 1899.

It is immaterial that the combination came into existence in 1899, or when it came into existence, and it would be immaterial that it had never come

into existence provided it could be shown that such a combination was imminent if not restrained. The danger that the defendants will be engaged henceforth in a combination in restraint of commerce is the ultimate fact upon which the application for relief is based. The existence of the combination and the present engagement therein is of value only as evidence of the danger. The danger is present, and therefore within three years.

Even a prosecution for a consipracy made and overtly acted upon more than three years ago is not barred by the statute of limitations if overt acts in pursuance thereof have been done also within three years.

Breese v. *United States*, 203 Fed. (C. C. A. 4th) 824, and cases cited at 830.

Lonabaugh v. *United States*, 179 Fed. (C. C. A. 8th) 476, 478.

Ware v. *United States*, 154 Fed. (C. C. A. 8th) 577, 579.

Hedderly v. *United States*, 193 Fed. (C. C. A. 9th) 561, 569.

Wilson v. *United States*, 190 Fed. (C. C. A. 2d) 427, 435.

Jones v. *United States*, 162 Fed. (C. C. A. 9th) 417, 426.

This is true where the prosecution is for a combination in unreasonable restraint of commerce, contrary to the terms of the Sherman Antitrust Act.

United States v. *Kissel*, 218 U. S. 601; 173 Fed. 823.

The offense defined is not only to "make" such a contract, but also to "engage" in any such combination. The combination is the device merely by which the restraint is accomplished. Therefore, when an injunction is sought, it is immaterial that the combination has passed its executory stage and has been completely formed.

Northern Securities Co. v. *United States*, 193 U. S. 197, 357.

It is immaterial that the combination was formed before the making thereof was made criminal, provided the engaging therein continues after so doing has become criminal. (*Supra*, p. 253.)

United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290.

Equally, it is no answer to a prosecution for *engaging* now in a combination in unreasonable restraint of commerce that the combination was made more than three years ago, so that the prosecution for the original *making* is barred.

It would be a deplorable result if a right to restrain commerce or to monopolize it for the long future could be acquired by doing it for three years in defiance of law.

CONCLUSION.

This combination is unlawful, and its continuance should be prevented.

These two railroads, separately conceived, separately aided as competitors by the United States, separately owned, parallel in the common sense,

transcontinental by their connections, competitive (theoretically and practically) in a huge volume of traffic, enjoying a monopoly of interstate freight transportation in large sections of south-central, central, and northern California, have been combined through the device of a holding company and thereby, and in consequence thereof, the competition between them has been unreasonably, directly, substantially, and wholly destroyed, and a monopoly has been created artificially, and this unreasonable restraint and monopoly are now going on and will continue unless prevented.

The evils of this unreasonable restraint, if it be not impertinent to address this legislative consideration to the court, have been those naturally incident to such a restraint—a destruction of the normal incentive to furnish good service at fair rates in order to attract business. There are no advantages to the public in the combination except such as may be urged in favor of permitting most of the artificial railroad monopolies—an alleged convenience to shippers, saving of expense, through tickets, through billings, joint through rates, and through trains. All of these may be provided and constantly are provided by agreement or by direction of the Interstate Commerce Commission, over railroads independently controlled, as, for example, in the case of the Union Pacific Railroad and its independent connections east and west. Congress has not considered them a sufficient reason to exempt railroad corporations from the antitrust act.

This restraint is peculiarly unreasonable in that it has produced as an inevitable consequence a systematic and preconcerted discrimination by the Central Pacific Railroad in favor of the Southern Pacific Railroad against the Union Pacific Railroad, contrary to the requirements of the Pacific Railroad Acts, under which the Central Pacific Railroad acquired the franchise by virtue of which it is now operating.

The prenatal combination of these two railroads alleged in the answer did not exist in fact, and is immaterial in law. The agreement of lease of February 17, 1885, in consequence of which the two railroads came under a common *de facto* control, was void and unlawful when made. The persistence in operating under it after 1890 was a violation of the antitrust act. This agreement of lease was canceled in 1893. Since this time the operation has been under a lease made since 1890, and in consequence of a control of stock first obtained in 1899.

The United States has never by its commissioners or otherwise given or attempted to give to the defendants an immunity for the subsequent infraction of the criminal laws of the United States, and the commission appointed July 7, 1898, had no authority and made no attempt to grant any such immunity.

The court in the case of the *United States* v. *Union Pacific Railroad Company* did not adjudge, expressly

or by inference, that it was not unlawful for the Southern Pacific Company to hold the stock of the Central Pacific Railway Company.

The lapse of time during which this unreasonable restraint of trade and this monopoly have existed gives no right to the defendants to continue to violate the law, and does not deprive the United States of remedy.

The cases hereinbefore cited, conspicuously *United States* v. *Union Pacific Railroad Company*, 226 U. S. 61, establish that the facts presented in the case at bar constitute an unreasonable restraint of commerce and a monopoly, and that the continuance thereof should be enjoined.

Respectfully submitted.

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FEBRUARY, 1921.

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